88-1488

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

CHARLSA SCHWARTZ, Individually, and as Administratrix of the Estate of HAROLD JOE SCHWARTZ, JR., Deceased, and as Next Friend of AIMEE NICOLE SCHWARTZ and AMANDA PAIGE SCHWARTZ, Minors, *Petitioners-Plaintiffs*

v.

JOHN DEERE COMPANY and DEERE & COMPANY, *Respondents-Defendants*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendix

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QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals for the Fifth Circuit conflicts with Rule 703 of the Federal Rules of Evidence?

2. Whether the decision of the Court of Appeals for the Fifth Circuit conflicts with the Seventh Amendment of the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

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2. Aimee Schwartz
3. Amanda Schwartz
4. Counsel: Law Offices of Windle Turley, P.C.
   Dallas, Texas
5. John Deere Company
6. Deere & Company
7. Counsel: Carrington, Coleman, Sloman & Blumenthal,
   Dallas, Texas

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REFERENCE TO OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in Appendix A.

The unpublished opinion of the United States District Court for the Northern District of Texas is reproduced in Appendix B.

Other pertinent information is reproduced in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 11, 1988. The Petition for Rehearing was denied on December 1, 1988.

The Supreme Court of the United States has jurisdiction to grant this Petition and review the decision of the Court of Appeals under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND RULES

(1) Amendment VII, U.S. Constitution:
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

(2) Rule 381(a), Federal Rules of Civil Procedure:
(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(3) Rule 703, Federal Rule of Evidence:
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

STATEMENT OF THE CASE

In October of 1980, Joe Schwartz, a 29 year old Texas farmer, was killed when he was pulled into the machinery of a John Deere harvesting combine. (TR. Vol. 3, p. 79.) Mr. Schwartz was probably attempting to unclog the "snap rolls" at the front of the cornhead on the combine, while the machine was running. (TR. Vol. 3, pp. 105, 160.) His body became entangled in the snap rolls and one leg was amputated and the second left hanging by tissue. Eventually freed from the machine by the Jaws of Life, Mr. Schwartz died on the way to

the hospital from massive blood loss. (TR. Vol. 3, pp. 278-9.)

John Deere had been aware of the hazard to farmers from the design of the snap rolls for at least 20 years and possibly 47 years. (TR. Vol. 3, pp. 88, 107.) The defect existed in an earlier machine (TR. Vol. 3, p. 107), a John Deere product safety group member acknowledged the danger in a published article (TR. Vol. 3, p. 107), and John Deere admits that the snap rolls danger is a leading cause of serious injuries during harvest. (TR. Vol. 3, p. 114.)

Since 1941, John Deere has owned the patent to an automatic cutoff switch that would eliminate the snap roll hazard. (TR. Vol. 3, p. 132.) Deere uses the switch, costing $15.00, on other equipment such as lawnmowers and garden tractors, but chose not to provide protection for farmers like Mr. Schwartz. (TR. Vol. 3, pp. 123, 132, 137.)

Invoking diversity jurisdiction, Mr. Schwartz' widow and two daughters sued John Deere and Deere & Company under theories of products liability as developed in §402A of the Restatement (2d) of Torts, part of the substantive law of Texas. *Shamrock Fuel Oil & Sales Co. v. Tunks*, 416 S.W.2d 779 (Tex. 1967). They presented the evidence outlined above, and other evidence, in support of liability, which is not in issue here.

The Schwartz family established its pecuniary loss by undisputed and uncontroverted evidence primarily from an expert witness. Relying upon facts and data commonly relied on by economists (App. pp. I-1–I-4), Dr. Everett Dillman, a retired economics professor, testified that Mr. Schwartz' future lost earning capacity was in excess of $1.5 million dollars. (App. p. I-8.) There was also evidence of other pecuniary and non-pecuniary damages from other witnesses. (TR. Vol. 3, p. 223; Vol. 4, pp. 253-61, 282-303.)

From the evidence, the jury found that the combine was defectively designed and that the defect was a producing

cause of Mr. Schwartz' injuries. The jury also found that Mr. Schwartz was contributorily negligent, and assessed 70% of the fault to John Deere and 30% to Mr. Schwartz. (App. p. H-11.)

The jury awarded to the family $150,000 in pecuniary damages from the date of death until trial and $1.5 million in future pecuniary damages. It also awarded $1 million in non-pecuniary damages and $100,000 to Mr. Schwartz' estate for his pain and suffering before he died. (App. pp. H-12–H-13.)

The jury then found that Deere acted with conscious indifference to the rights and welfare of users of the combine and awarded $1.5 million in exemplary damages. (App. p. H-13.)

The trial court took away the exemplary damage award (App. pp. B-4–B-5) but rendered judgment in favor of the Schwartz family for the remaining damages, totaling $1,925,000 plus interest after the 30% contributory negligence reduction. (App. p. F-4.)

The Fifth Circuit affirmed the liability portion of the judgment, the denial of punitive damages, and the pain and suffering award to Mr. Schwartz' estate. (App. p. A-6.) It severed, reversed and remanded for new trial the pecuniary damages because it believed them to be speculative, and the non-pecuniary damages because it feared the jury might be confused about the differences between pecuniary and non-pecuniary damages. (App. pp. A-3–A-6.) The Schwartz' motion for rehearing was overruled. (App. p. D-1.)

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's Decision Violates The Letter and The Spirit of Federal Rule of Evidence 703.

A. The Issue Is Important.

The issue in this case is the extent to which U.S. courts can, or must, evaluate the information upon which an expert bases an opinion. Is Rule 703 to be construed as written, to mean

experts can use the data relied on by other experts in the field as a basis for opinion testimony?

The issue is important nationally because expert opinion evidence is used in a high percentage of cases tried in U.S. District Courts, the various courts are not uniform in their handling of the evidence, and the lower courts need instruction and guidance on the meaning of Fed. R. Evid. 703. The issue is important to the litigants in this case because the Fifth Circuit erroneously rejected as speculative the expert testimony that was the basis for Petitioners' pecuniary damages and reversed a judment favorable to Petitioners–although the evidence given by the expert witness was undisputed, admitted without objection and based upon information relied upon by experts in the field. (App. pp. I-1–I-5.)

B. The Circuits Are in Conflict.

Two views have developed on the extent to which a court can or must test the basis of an expert's opinion. Characterized as liberal and conservative views by various sources, 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 703[03] pp. 703-13-33 (1988) [hereinafter *Weinstein's Evidence*]; *In Re Agent Orange Product Liability Litigation*, 611 F.Supp. 1223, 1243-45 (E.D.N.Y. 1985), aff'd, 818 F.2d 187 (2d. Cir. 1987); it would be more accurate to classify the approaches as restrained and activist. Thus, according proper deference to the literal wording of Rule 703, and eschewing judicial annotation, are the 3rd, 6th, 7th and 10th Circuits. *In Re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3rd Cir. 1983), rev'd on other grounds sub nom., *Matsushita Electronic Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574, (1986); *Lewis v. Rego Co.*, 757 F.2d 66, 74 (3rd Cir. 1985); *Mannino v. International Manufacturing Co.*, 650 F.2d 846, 851 (6th Cir. 1981); *Johnson v. Consolidated Rail Corp.*, 797 F.2d 1440, 1446-47 (7th Cir. 1986); *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980), cert. denied 450 U.S. 918 (1981).

Most instructive on the restrained approach is the Third Circuit decision in *In Re Japanese Electronic Products Antitrust Litigation, supra*. The trial court had undertaken its own investigation of the reliability of the information upon which the experts relied, ignoring evidence from experts that detailed acceptable information. Rejecting that role for the judiciary, the Third Circuit pointed out that "the proper inquiry is not what the court deems reliable but what experts in the relevant discipline deem it to be." 723 F.2d at 276-277. For that reason, "the trial judge misapplied Rule 703 in concluding that he, not the experts in the field, was the source of information about reasonable reliance." *Id.* at 280.

As the Tenth Circuit pointed out in *Smith v. Ford Motor Co., supra* at 793, the burden of exploring the underpinnings of an expert's testimony is, under our adversary system, "squarely on the shoulders of opposing counsel's cross-examination."

In contrast, the Fifth Circuit has completely re-written Rule 703 by judicial fiat. See, e.g., *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422-23 (5th Cir. 1987); *In Re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233-35 (5th Cir. 1986); and *Marks v. Pan American World Airways, Inc.*, 785 F.2d 539, 542 (5th Cir. 1986). Instead of determining whether the opinion is based on data used by the experts in the field, the Fifth Circuit applies its own subjective credibility test. Thus, in *Marks*, the Court found fault with an expert economist's conclusion because he had not considered certain items the Court thought important, yet there is no indication that the Court tried to find out whether the economist's approach was considered sound by other expert economists.

Perhaps best illustrative of the Fifth Circuit's view is *In Re Air Crash Disaster at New Orleans, La., supra* at 1233-34. Although purporting to give deference to the trial court's discretion in determining admissibility of evidence, the Court makes it clear that it will impose subjective admissibility standards on expert testimony – standards that are not in the

Rules, not in the case law, and unknown until formulated by the Fifth Circuit, on a case-by-case basis. *Soden v. Freightliner Corp.*, 714 F.2d 498, 503 (5th Cir. 1983). Specifically, in the New Orleans case, the Court suggested the trial judge should gauge admissibility by, among other things, the extent to which a witness had submitted his or her opinions "to a refereed journal" and by the number of times a witness has testified. 795 F.2d at 1234. (Contrary to logic, the more a witness testifies, the less qualified he is to testify, in the Fifth Circuit's eyes.)

In this case, the Fifth Circuit took the same approach, suggesting that the expert should have based his opinion of future earning capacity on actual earnings, instead of earning ability, and should have gathered more information in Mr. Schwartz' home town. (App. pp. A-4–A-6.) The Court made no attempt to determine whether the base it wants is economically sound or acceptable to and relied on by economists, who know far more about earning capacity than the Fifth Circuit.

C. The Fifth Circuit Is Wrong.

Two facts illustrate the invalidity of the Fifth Circuit's approach. First, by imposing a subjective standard that allows the appellate court to decide, after trial and by its own impressions, whether an expert witness can testify, it applies an impossible review standard to trial judges and trial lawyers. How good is good enough? Specifically, how many "refereed articles" must the witness have written? How many times can a witness testify before he or she must stay away from the courthouse for an as yet unknown length of time? (And, does it matter which side the witness testifies for?)

Specifically, in this case, must an expert base an opinion of lost earnings solely on past earnings, instead of earning capacity? That is certainly what the Fifth Circuit suggests. Yet, if that is the Rule, this family would not be entitled to recover any lost earnings for Joe Schwartz' death, because he had been losing money in his farming operation for several years.

This new rule by the Fifth Circuit would require an economist to assume that, economics aside, a well-educated and ambitious young farmer would not have enough sense to abandon a losing situation and get into a profitable one at some point in his future.

Second, by its subjective, case-by-case approach, the Fifth Circuit is assuming a fact finding role, often without any evidence to support its finding. The only inquiry under Rule 703 is whether the economist relied upon the kind of data economists use. In this case, the economist said he did and John Deere did not object either to his expert status or to his opinion and offered nothing to dispute the validity of the bases for his opinion. Yet, the Fifth Circuit, with no evidentiary support, finds that the economist used improper data.

Implicit throughout the Fifth Circuit's opinions is its view that it knows better than the expert in the field what an expert must rely on in formulating an opinion. One of the defects in that view is summarized by *Weinstein*, as follows:

> The authors have found that a more liberal view can work quite well in practice. . . . And, in jury cases, when the matter is brought to the jurors' attention by a proper instruction, they show a full sensitivity to the problem – in fact often discounting the expert's opinion too much when it is based on hearsay or secondary evidence of documents or the like. We ought not assume the jurors are less intelligent or alert than lawyers or judges. And we ought not inhibit experts from giving us as much aid as they can. (Footnotes omitted.)

Weinstein's Evidence, *supra*, at §703[03], p. 703-29.

The Rule is clear and precise: an expert witness is permitted to base an expert opinion on facts or data of a type reasonably relied on by experts in the field. If the Rule is applied as written, the trial judge has an exact guideline for resolving challenges to an expert witness. If the Rule is applied as suggested by the Fifth Circuit, however, there are no fixed guidelines. When the case reaches the Fifth Circuit, it reviews the

facts and data upon which the witness relied and reviews the background of the witness, then tells the trial court whether the witness should have testified. The Fifth Circuit's subjective, case-by-case approach is wrong because it violates Rule 703 and it is wrong because it is poor judicial policy. This Court should resolve the conflicts and emphasize the correct policy, as it is stated in the Rule.

2. The Fifth Circuit's Decision Violates the Seventh Amendment.

The Seventh Amendment to the U. S. Constitution forbids re-examination of facts found by a jury other than according to the rules of common law. Under that mandate, the U.S. Supreme Court has continually refused to allow U.S. courts, trial and appellate, to redetermine facts found by a jury on sufficient evidence. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897); *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962).

The Fifth Circuit acknowledges the scope and validity of the prohibition, *Garcia v. Murphy Pacific Marine Salvaging Co.*, 476 F.2d 303 (5th Cir. 1973); *Home Insurance Co. of New York v. Tydal Co.*, 157 F.2d 851 (5th Cir. 1946), but did not follow the constitutional mandate in this case. The Court violated the Constitution at least four times.

A. The Pecuniary Loss Findings.

The discussion under point 1, *supra*, outlines the Fifth Circuit's treatment of the undisputed evidence that supports the jury's finding of damages for the pecuniary losses suffered by the Schwartz family. Certainly the Fifth Circuit's refusal to acknowledge the validity of the supporting evidence is a direct violation of the Seventh Amendment. Under the guise of discounting the basis for the supporting evidence, the Fifth Circuit has reexamined the evidence and set aside facts found by the jury on undisputed evidence.

B. The Exemplary Damages Findings.

Relying on the evidence outlined in the Statement, *supra*, and other evidence, the jury found that John Deere acted "with conscious indifference to the rights and welfare" of Joe Schwartz. It assessed exemplary damages of 1.5 million dollars. The District Court took away that award because it erroneously believed the Schwartz family "needed to show [and did not] that Deere actually knew of the increased peril of operating the combine without a cutoff switch and consciously chose to ignore the risk." (App. p. B-4.)

A majority of the Fifth Circuit panel followed the trial court's lead, holding that the findings could not be honored because "there are other explanations for Deere's failure to install the [cutoff] switch other than indifference." (App. p. A-4.)

Dissenting, Judge Johnson pointed out that the Fifth Circuit was doing exactly what it cannot do, in setting aside factual findings that are supported by ample evidence. (App. p. A-7.) Judge Johnson is correct.

The Texas law of exemplary damages upon which the Fifth Circuit must rely is set out in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981). In that case, the Texas Supreme Court carefully crafted the two elements of gross negligence upon which exemplary damages in Texas must rest. Those elements are (1) an entire want of care, which would (2) raise the belief that the act or omission complained of was the result of conscious indifference to the rights or welfare of the person affected by it. 616 S.W.2d at 920.

The elements are supported by evidence in this case that Deere had specific knowledge at least since the 1950s of the risks of injury and death associated with the defective combine and had acknowledged the danger in a published article, that Deere knew the user was not aware of the danger, that Deere knew how to alleviate the danger and had done so on other equipment and that Deere owned the patent to a cutoff

switch that could, at a cost of $15.00, eliminate the danger. (TR. Vol. 3, pp. 88-137.) Thus, Deere knew of the exact danger, knew that the user was not aware of it, knew how to eliminate the danger, and could have done so for $15.00 per combine.

It is a direct violation of the Seventh Amendment to hold, as the lower courts have under those facts, that the summarized evidence will not allow a jury to conclude that Deere had demonstrated an entire want of care, raising a belief that it was consciously indifferent to the rights of Joe Schwartz.

The Fifth Circuit's rationale that there were "other explanations" for Deere's failure to install the cutoff switch is puzzling. There are always "other explanations" for incriminating conduct; that is how the adversary system functions. But, when there are other explanations, the jury, not two appellate judges, must decide whether Deere failed to act for a good reason or because of conscious indifference.

No complicated or convaluted arguments are necessary on this matter. The Fifth Circuit was required to apply Texas substantive law in this diversity case. *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). Texas substantive law establishes two elements of gross negligence and allows a jury to assess exemplary damages if it finds those elements. *Burk Royalty Co. v. Walls, supra.* The Schwartz family introduced evidence in support of the elements and John Deere attempted to explain away its behavior. The jury believed the Schwartz family's evidence and did not believe John Deere's evidence. To this point, no one who has worked on this case – Deere, the District Court, or the Fifth Circuit – has cited one authority, case, statute, or constitutional provision that validates the refusal of the lower courts to give the jury verdict the constitutional shield to which it is entitled.

In order to exemplify the importance of the Seventh Amendment, and to remind the lower courts that they cannot indiscriminantly ignore the jury, this Court should correct the error.

C. The Non-Pecuniary Damages.

The next two Seventh Amendment violations by the Fifth Circuit are, perhaps, the best examples of the lack of importance it attaches to the Amendment and the jury system. In addition to pecuniary damages, the jury was asked to assess damages for two kinds of non-pecuniary loss incurred by the Schwartz family: (1) mental anguish and (2) loss of companionship and society. The trial court carefully instructed the jury on the elements of pecuniary loss, none of which duplicate either mental anguish or loss of companionship. (App. p. H-10.)

The Fifth Circuit does not suggest that the awards for mental anguish and loss of companionship are excessive, or that they are not supported by the evidence or that they are not proper awards under Texas law. However, it takes those awards away from the Schwartz family and orders them retried because "in the minds of the jurors there is likely to be confusion between the pecuniary loss of care, nurture, guidance and advice and the non-pecuniary loss of companionship." (App. p. A-6.)

The holding assumes, with nothing to support the assumption, that the jury will do the very thing the trial judge tells them they should not do. They were told, and will again be instructed, that pecuniary loss includes certain listed elements "and none other." The Fifth Circuit's rationalization, danger of confusion, can rest only on the Fifth Circuit's belief that the jury will not follow the instructions it is given – and that assumption without supporting evidence undermines the entire jury system and is contrary to the Fifth Circuit's own decisions. *Wright v. State of Texas*, 533 F.2d 185 (5th Cir., 1976); *DeLaCruz v. Atchison, Topeka & Santa Fe Railway Co.*, 405 F.2d 459 (5th Cir. 1968), cert. denied, 395 U.S. 908 (1969).

If the Fifth Circuit were truly concerned about duplication, it could have solved the problem by affirming all of the non-

pecuniary awards and telling the judge to instruct the jury that it should not include in its pecuniary awards any sum for loss of companionship.

Finally, Petitioners do not know why the $350,000 mental anguish award was taken away from them, because the Fifth Circuit gives no reason for doing so. Unlike the vacating of the loss of companionship award, the Court does not suggest that there is danger of confusion. Nor does it hold the award excessive, or find fault with the evidence or with any of the parties. It does not even use the correct damage figure when discussing the non-pecuniary awards. (App. p. A-6.) It simply reverses for a new trial and includes the mental anguish award in its sweeping action. Petitioners, the jurors, the trial judge and the legal system are, under the United States Constitution, entitled to better treatment.

CONCLUSION

Petitioners have suffered a terrible loss. That fact does not, of course, entitle them to a review of their case by the U.S. Supreme Court. When, however, the Rules of Evidence are rewritten by an appellate court in a manner that conflicts with the Rules and decisions of other appellate courts, when jury findings supported by evidence are set aside in derogation of the Constitution and when $350,000 is taken from a litigant with no explanation, then the Supreme Court should exercise its discretion and grant this petition. It can then set the policy that will guide the use of the Rules of Evidence, it can remind the lower courts that the Constitution must be followed, and in the process, it can correct an injustice.

For the foregoing reasons, Petitioners respectfully request the Supreme Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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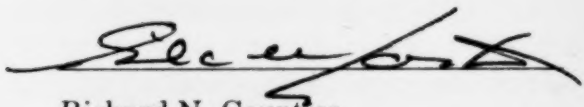

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1934

CHARLSA SCHWARTZ, Individually and as Administratrix of the Estate of HAROLD JOE SCHWARTZ, JR., Deceased, and as Next Friend of AIMEE NICOLE SCHWARTZ and AMANDA PAIGE SCHWARTZ, Minors, Plaintiffs-Appellees, Cross-Appellants,

v.

JOHN DEERE CO. and DEERE & COMPANY, Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(CA3-86-0893-H)

(October 11, 1988)

Before REAVLEY, JOHNSON and JONES, Circuit Judges.

REAVLEY, Circuit Judge:*

The judgment of $100,000 because of pain and suffering of Joe Schwartz is affirmed. The liability of Deere for compensatory damages, excluding punitive damages, is approved. A new trial is ordered to determine the pecuniary and non-pecuniary damages suffered by Charlsa Schwartz and her two daughters. Our reasons are as follows:

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

1. The district court's admission of evidence of other accidents involving cornpickers, a machine having some common functions with a cornhead machine and presenting comparable dangers, tending to prove Deere's awareness of a hazard (through never denied) was within that court's discretion. *See Jones v. Laughlin Steele Corp. v. Matherne*, 348 F.2d 394, 400 (5th Cir. 1965) (the trial court is given discretion in evidentiary matters); *McGonigal v. Gearhart Industries, Inc.*, No. 87-2587, slip op. at 5 (5th Cir. 1988) (the requirements of similarity for introducing evidence of other accidents to show defendant's awareness of a hazard have been relaxed, citing *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1083 (5th Cir. 1986)).

2. The district court also correctly granted Deere's motion for judgment n.o.v. on the issue of conscious indifference and exemplary damages. Under the Texas law Charlsa Schwartz must show by a preponderance of the evidence that Deere exhibited conscious indifference toward the rights and welfare of her husband. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981). "In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care." *Id.* The inquiry involves a review of all the surrounding circumstances in determining whether the requisite mental state is shown. *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1374 (5th Cir. 1982), *later app.*, 722 F.2d 1238 (5th Cir. 1984).

The support for the finding must be found in the testimony of John Sevart. Sevart testified that Deere could have foreseen the possibility that an operator could be pulled in while the machines were turned on, and that there were alternative safety measures available to Deere. Given the unavoidable dangers of the cornhead when powered by the combine, Sevart testified that warnings alone provided inadequate protection and that the use of a cut-off switch was necessary.

Deere concedes that it was fully aware of the hazard. For that reason warnings were placed on the machines and in the

user manuals. The jury found the design of the combine defective because it lacked a cut-off switch. To fault Deere's judgment by the effect of that finding does not say that Deere was consciously indifferent to the rights and welfare of users of the products. To allow that inference would elevate all findings of negligence or design defect to that of gross negligence. The question is whether Deere was indifferent to the injuries that might result from failure to install the switch.

In *Burk Royalty*, the Texas Supreme Court found gross negligence on the part of Swetnam, a district superintendent of the defendant company, whose responsibilities included safety. The evidence showed that Swetnam had directed the use of a particular dangerous method for pulling wet tubing from an oil well without checking out compliance of company safety procedures at the site. Safety measures were shown to be casually followed throughout the district. In *Maxey*, the Fifth Circuit reversed the district court's grant of a judgment n.o.v. on an award of exemplary damages because it found evidence of conscious indifference in Freightliner's total failures to conduct crash safety research, or run tests, or attempt modifications before or after it became aware of the problem of rupturing gas tanks. In addition, a representative of Freightliner testified that a disabled truck with leaking, ignited gas and trapped occupants posed no risk of harm to justify a change in design.

It is the burden of the plaintiff to prove that a defendant did not care about endangering people, although circumstances usually have to be relied upon to make that proof. Deere's conduct under the circumstances does not warrant an inference of indifference or disregard of the problem of safety. The danger was recognized and a warning was posted on the machine. A patent was obtained for a cut-off switch and Deere installed the device in some of its products. Sevart testified that his information was that Deere had field tested a machine with a cut-off switch. He also conceded that safety devices which prove to be nuisances to the user will not be effective. Related to that is the testimony of Joe Schwartz's father, himself a

farmer, who explained that the only good way to clear a clogged cornhead is while it is running. An extremely well trained and experienced farmer and farm machine operator, Joe Schwartz was either doing just that or, as Garcia speculated, investigating a noise in the cornhead when this accident occurred. Farmers who insist on that manner of operation will not engage a second worker to accompany the machine or refrain from overriding a cut-off switch. The point of this is that there are other explanations for Deere's failure to install the switch other than indifference. It follows that mere evidence of the failure to install could not support a finding of the state of mind that does not care about the safety of operators.

3. The difficulty we find with the judgment is the $1,600,000 awarded for pecuniary loss. Pecuniary damages consist of the dollars the deceased would have contributed to the widow and two daughters if he had lived, plus the dollar value of services and training, care and advice, that he would have contributed. Future contributions must, of course, be discounted to present value. Future circumstances are predictable to the degree of probability only, and there is no precise dollar measure for that which cannot be bought or sold. We know that there has been a pecuniary loss to this widow and her children, and we may accept the best evidence reasonably available on dollar amounts, leaving the fact finder's decision to reasonable inference. That decision must, however, be based on the facts of the particular case and be reasonably related to future expectations. It should be more than mere guess or speculation.

The facts to support this award are very limited: Joe Schwartz was a good father and husband. He sometimes helped around the house. He did not like to clean but once in a while would offer to do so. He mowed the yard and helped put up corn and peas from the garden. He had lost more money than he had made during his ten years of farming, but farming had been his training and he still intended to make it as a farmer. The jury was certainly entitled to believe that, by farming or some other means, Joe Schwartz would have supported his family. The question is the material extent of that

support. The investment of $1,600,000 at 8 percent interest would produce $128,000 in one year, far more than the Schwartz family could reasonably expect.

We may assume the admissibility of Dr. Dillman's testimony, and Deere waived no objection to its weight or sufficiency by not objecting to it. Its weight, however, contributed no proper support for the determination of these damages, and indeed probably misled the jury. Dr. Dillman used census data for the average earnings of all American males with five or more years of college and computed the value of Joe Schwartz's future earnings through his 70th birthday at $1,515,407. The relationship of the earnings of American males with graduate level educations to the likely earnings of Joe Schwartz is tenuous at best. But the jury apparently used Dillman's total for the former to make its finding for Schwartz, ignoring the difference between the earning potential and contribution to the family.

The Texas courts hold that the pecuniary loss in a wrongful death case is calculated primarily upon the element of a projection into the future of the decedent's past earnings. In all cases the award must bear some ascertainable relation to the pecuniary benefits which the decedent's wife and children might reasonably have expected to receive had the wrongful death not occurred. *Dover Corp. v. Perez*, 587 S.W.2d 761, 770 (Tex. Civ. App. – Corpus Christi 1979, writ ref'd n.r.e.); *Halliburton Company v. Olivas*, 517 S.W.2d 349, 354 (Tex. Civ. App. – El Paso 1974, no writ); *Simpson v. United States*, 322 F.2d 688, 691-92 (5th Cir. 1963). The proof of earning capacity must be evidence from which a jury may reasonably measure in monetary terms that capacity, unless some reason is shown for the failure to produce that evidence. *See Bonney v. San Antonio Transit Co.*, 325 S.W.2d 117, 121 (Tex. 1959). There must be some basis in the evidence. *Detar Hosp., Inc. v. Estrada*, 694 S.W.2d 359, 364 (Tex. App. – Corpus Christi 1985, no writ).

There is no evidence in this record of the lost contributions to this family for their support, not even information of earnings of people in Hale Center or the Panhandle area doing jobs or in businesses Joe Schwartz might have filled. We know only that the deceased was a farmer, of fine character but losing money. All the jury could do was guess. Likewise, we cannot revise that award, because we would be only guessing too.

4. We will not decide the issue of the excessiveness of the $600,000 award of non-pecuniary damages, because we do not believe a new trial should be limited to pecuniary damages alone. In the minds of the jurors there is likely to be confusion between the pecuniary loss of care, nurture, guidance and advice and the non-pecuniary loss of companionship. The same jury should make these determinations to avoid duplication of damages. An issue to be retried must be so distinct and separable from others that a trial of it alone may be had without injustice. 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2814 at 93 (1973).

The case is remanded for new trial of the damages issues under the wrongful death claims. Liability of Deere, the denial of punitive damages and the judgment for pain and suffering of Joe Schwartz are all affirmed.

AFFIRMED in part, VACATED in part. REMANDED.

Johnson, J., Circuit Judge dissenting.

Plaintiff Charsla Schwartz brought the instant products liability action against defendant John Deere & Company (Deere) after her husband, farmer Joe Schwartz, was killed when his body became tangled in the "snap rolls" of a cornhead and combine manufactured by Deere. Mr. Schwartz had been pulled into the machinery while trying to unclog the snap rolls which are able to, and do, pull corn stalks through the John Deere machine faster than a man can release the stalks. The jury found Deere liable for the death of Joe Schwartz and awarded damages to Charsla Schwartz and her two young daughters. The above damage award included $1,500,000 in

exemplary damages based on a finding by the jury of gross negligence on the part of Deere. The district court then granted Deere's motion for judgment notwithstanding the verdict on the finding of gross negligence and also set aside the award of punitive damages. The majority of the panel today concludes that the jury's finding of gross negligence and subsequent award of exemplary damages should be set aside. Contrary to the majority, I do not perceive the instant case to be one of those rare instances wherein the Court is permitted to set aside the factual findings of a jury. Accordingly, I dissent from that portion of the majority opinion which affirms the district court on this issue.

Initially, it must be recognized that the standard by which a district court determines whether to grant a judgment n.o.v. is an especially stringent one so as to protect the integrity of the factfinding process. A district court is prohibited from granting a motion for judgment n.o.v. unless "the evidence points so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict." *Knight v. Texaco, Inc.*, 786 F.2d 1296, 1298 (5th Cir. 1986). Further, in making the above determination, a district court is to consider all of the evidence presented to the jury in the light most favorable to the nonmoving party. *Boeing Company v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). If the evidence is such that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions, the motion for judgment n.o.v. should be denied. *Id.*

To establish gross negligence on the part of a defendant in a products liability action, Texas law provides that a plaintiff must show by a preponderance of the evidence that the defendant exhibited a conscious indifference toward the rights and welfare of the purchaser or consumer. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981). As the majority correctly states, the above showing by the plaintiff includes establishing that the "defendant knew about the peril, but his acts or omissions demonstrated that he didn't care." *Id.* In the

instant case, the jury concluded, after evaluating the evidence presented at trial, that the combine which was manufactured by Deere and which Joe Schwartz was operating at the time of his death was defectively designed. The jury further found that Deere's course of conduct in this regard reflected conscious indifference to the rights and welfare of purchasers and users of the combine. As I perceive the evidence to be altogether sufficient to enable reasonable and fair-minded jurors to reach the above findings, the majority is believed to be in error in failing to respect the findings of the jury.

Specifically, evidence was presented to the jury that Deere possessed knowledge of the risk of serious injury and death associated with operating the defective combine as early as the 1950s. Deere apparently attempted to alleviate the risk by placing warnings on the machinery to the effect that the users should not attempt the unclogging operation while the machine was still running. John Sevart, a licensed professional engineer, testified that the written warnings alone were not adequate protection against the risks associated with operating the combine. Sevart further stated that alternative safety devices, such as a strategically located cut-off switch, could be installed on the combine to protect against serious injury and death. Significantly, Deere had installed such a cut-off switch in its lawnmowers and garden tractors to protect against similar accidents by consumers. Deere in fact actually owned the patent for the cut-off safety device. Finally, the following statement in a published paper by the Chairman of John Deere's Product Safety Group in 1968 established Deere's knowledge of the risk of injury in operating the combine and Deere's knowledge that the risk was not fully appreciated by the average farmer:

> The man who hasn't lost an arm in a cornpicker hasn't had the experience that tells him he can't release the corn stalk before his hand is pulled between the rolls.

Deere concedes that it was fully aware of the hazard that a farmer might be pulled in the cornhead while the machinery

was operating – the very hazard which eventually killed Joe Schwartz. However, Deere offers as justification for its failure to use cut-off switches on its combine to prevent such a hazard the fact that farmers are likely to find cut-off switches too cumbersome and thus, will manually disable such devices which in turn decreases product safety. Deere's justification does no more than reflect a decision on the part of Deere to elevate convenience over safety. In fact, Deere's assertion that a cut-off switch would be too cumbersome in operation could have been correctly understood by the jury as a decision by Deere not to install the cut-off switch which was motivated by a concern relating to reduced sales of its combines because of a perception by farmers that the Deere combine might be a nuisance to operate with the cut-off switch. Surely, such an inference as to Deere's motivation could have been reached by the jury on the basis of the evidence presented at trial. That the switch *might* be a nuisance and *might* reduce the effectiveness of the safety device does not excuse Deere's failure to incorporate the switch or some other device to reduce the danger in light of the long string of serious injuries resulting from the operation of the combine.

The majority is concerned that to allow a finding of gross negligence in the instant case would "elevate all findings of negligence or design defect to that of gross negligence." The majority's concern, however well-meant, is misplaced in the instant case in view of the evidence presented to the jury. In *Maxey v. Freightliner*, 722 F.2d 1238 (5th Cir. 1984), this court upheld a jury's award of exemplary damages on facts which revealed that the defendant failed to conduct safety research or run tests and attempt modifications of a product design after it became aware of the safety risk in the product. In the instant case, Deere knew of the risk inherent in operating the combine, attempted to alleviate that risk with written warnings, but then failed to further modify the design of the combine despite the fact that a cut-off switch would be likely to reduce the risk of serious injury and death associated with operation of the combine.

The majority is correct in stating that there may have been other explanations for Deere's failure to install the cut-off switch on its combine other than indifference to the safety of its consumers. Nevertheless, the jury chose to credit the explanation that Deere was consciously indifferent to the welfare of its purchasers. This may not be the only explanation for Deere's action, but it is cetainly one supported by the evidence in this case. The majority's decision today effectively substitutes the court's judgment for that of the jury by adopting a different explanation for Deere's conduct. By doing so, the majority disregards the deference which is, and which has been, traditionally afforded to the findings of a jury in these matters. Because sufficient evidence was presented to support the jury's finding of gross negligence and award of exemplary damages, I would reverse the judgment of the district court granting Deere's motion for judgment n.o.v. on this issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Nov. 10, 1987

CA-3-86-0893-H

CHARLSA SCHWARTZ, Individually and as Administratrix of the Estate of HAROLD JOE SCHWARTZ, JR., Deceased, and as Next Friend of AIMEE NICOLE SCHWARTZ and AMANDA PAIGE SCHWARTZ, Minors, Plaintiffs

v.

JOHN DEERE COMPANY and DEERE & COMPANY, Defendants

MEMORANDUM OPINION

Before the Court are a motion for new trial or for J.N.O.V., filed August 31, 1987, on behalf of defendants, the response of plaintiffs thereto, filed September 11, 1987, and plaintiffs' proposed judgment.

I.

This products liability case arose from the death of Harold Joe Schwartz ("Schwartz"). The plaintiff, Charlsa Schwartz Stuckey ("Stuckey"), brought this action as the surviving spouse and Administratrix of the Estate of Harold Joe Schwartz, and as Next Friend of Aimee Nicole Schwartz and Amanda Paige Schwartz, minor children of the deceased. The plaintiffs alleged that a combine and cornhead manufactured by the defendants, John Deere and Company and Deere & Company ("Deere"), were defective, and that the defects were a producing cause of Schwartz's injuries and death. Plaintiffs alleged that the cornhead and combine were defec-

tive for lack of adequate warning, and that the combine was defectively designed because it lacked a cut-off switch. Plaintiffs further alleged that with regard to the product defects Deere acted with conscious indifference to the rights and welfare of purchasers and users of the cornhead and combine.

A jury trial was held before Circuit Judge Robert M. Hill, sitting by designation. The jury returned a verdict on August 17, 1987, finding that the combine was defectively designed because it lacked a cut-off switch and that such defect was a producing cause of Schwartz's injuries, but that a lack of adequate warning, if any, was not a producing cause of Schwartz's injuries. The jury found that Schwartz was contributorily negligent and that such negligence proximately caused 30% of his injuries. The jury further found that Deere acted with conscious indifference to the rights and welfare of purchasers and users of the combine. The jury awarded as damages for their past and future pecuniary losses, $600,000 to Charlsa Stuckey, and $525,000 each to Aimee and Amanda Schwartz. As damages for the past and future mental anguish suffered by plaintiffs, the jury awarded $400,000 to Charlsa Stuckey and $50,000 each to Aimee and Amanda Schwartz. For their past and future loss of companionship and society, the jury awarded $200,000 to Charlsa Stuckey and $150,000 each to Aimee and Amanda Schwartz. The jury awarded $100,000 damages for the conscious pain and suffering experienced by Schwartz before his death as a result of his accident. Finally, the jury assessed $1,500,000 against Deere as exemplary damages.

Deere has moved for judgment notwithstanding the verdict. Deere seeks to have the finding of conscious indifference and the award of exemplary damages set aside as being against the great weight of the evidence. Deere also contends that there is no evidence of what financial support, if any, Schwartz would have provided to his family had he lived. Deere therefore moves that the jury's verdict for pecuniary loss be set aside, or alternatively, a new trial granted on the issue. Deere also requests a remittitur of the amounts

awarded to Charlsa Stuckey for her past and future mental anguish and loss of companionship so that Stuckey's total recovery for these elements of damages would be $250,000. Alternatively, Deere requests a new trial on these damages. Finally, Deere asks for a new trial on the issues of product defect and exemplary damages on the ground that plaintiffs' evidence of other accidents involving corn harvesting equipment was erroneously admitted.

The Court has reviewed the parties' motions and briefs as well as the trial transcript. For the reasons set out below, the Court denies defendants' motion for new trial or j.n.o.v. in all respects except as to exemplary damages. The Court will enter judgment notwithstanding the jury's verdict finding conscious indifference on the part of Deere, and plaintiffs will recover no exemplary damages. Judgment will be entered pursuant to the jury's verdict in all other respects. All of the dollar amounts awarded by the jury will be reduced by 30% in accordance with *Mayo v. Tri-Bell Industries, Inc.*, 787 F.2d 1007 (5th Cir. 1986), to account for the percentage of Schwartz's injuries found to be proximately caused by Schwartz's negligence.

II.

The district court is prohibited from granting a motion for j.n.o.v. unless "the evidence points so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict." *Knight v. Texaco, Inc.*, 786 F.2d 1296, 1298 (5th Cir. 1986); *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). In making such a determination, the court must consider all of the evidence presented to the jury in the light most favorable to the nonmoving party. *Id.* Nevertheless, a mere scintilla of evidence is not sufficient to support a jury verdict; there must be a conflict in substantial evidence. *Boeing*, 411 F.2d at 374-75.

Exemplary Damages

The first issue on which defendants seek judgment n.o.v. is the issue of exemplary damages. Texas law on gross negligence and exemplary damages was most recently set forth in *Burke Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981). The Texas Supreme Court stated:

> What lifts *ordinary* negligence into *gross* negligence is the mental attitude of the defendant; that is what justifies the penal nature of the imposition of exemplary damages. The plaintiff must show that the defendant was consciously, i.e., knowingly, indifferent to his rights, welfare and safety. In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care.

Id. at 922 (emphasis in original). The court went on to discuss the type of evidence necessary to support a finding of conscious indifference:

> [M]any circumstances and elements may be considered in determining whether an act constitutes gross negligence. A mental state may be inferred from actions. All actions or circumstances indicating a state of mind amounting to a conscious indifference must be examined in deciding if there is some evidence of gross negligence.

Id. Thus, Schwartz needed to show that Deere actually knew of the increased peril of operating the combine without a cut-off switch and consciously chose to ignore the risk. Although a jury may infer a defendant's actual knowledge of a risk and conscious indifference to it by evaluating defendant's acts or omissions, in this case no evidence was presented from which the jury could reasonably infer that Deere both knew and did not care about any increased peril to combine operators that would be caused by failure to install a cut-off switch. There simply was no evidence of any acts or omissions by Deere that could reasonably give rise to an inference that Deere was consciously indifferent to the rights and safety of people in the

field. Accordingly, with respect to exemplary damages, the Court grants defendants' motion for judgment n.o.v. The jury's finding of conscious indifference and award of exemplary damages will be set aside.

Pecuniary Damages

The Court disagrees, however, with defendants' contention that the jury's finding of pecuniary loss is unsupported by the evidence. The defendants contend that the jury's award of pecuniary damages is supported only by the testimony of plaintiffs' expert economic witness, Dr. Edward Dillman, and that such testimony is without foundation and entitled to no weight because it is not grounded in fact. Defendants cite the court to two cases in which the Fifth Circuit invalidated or affirmed the district court's grant of j.n.o.v. invalidating jury awards for loss of inheritance under Louisiana law. *See Eymard v. Pan American World Airways, Inc.*, 795 F.2d 1230 (5th Cir. 1986); *Marks v. Pan American World Airways, Inc.*, 785 F.2d 539 (5th Cir. 1986).

In order to establish loss of inheritance as an element of damages, the plaintiffs in *Eymard* and *Marks* needed to show what portion of decedent's income would have been saved and eventually constituted plaintiffs' inheritance from the decedent. In *Marks* the court held that the testimony of plaintiffs' expert economist was too speculative to support the award. *Marks*, 785 F.2d at 542. The economist based his analysis of plaintiffs' likely loss of inheritance on decedent's income stream of the past several years as reflected in his tax returns. Because the court recognized the inherent speculativeness of an award for loss of inheritance, it searched for "evidence which might reduce the speculative quality necessarily inherent in the hope or expectation of a future inheritance." *Id.* The court found no persuasive evidence of decedent's probable future work and investments plans and no evidence of "his spending habits, commitments to savings plans, asset growth plans or other estate building plans for the children, tax motivated planning, or the probable effect of federal and state

estate or inheritance tax which might ultimately have to be paid." *Id.*

In *Eymard* the court likewise reversed a jury award of damages for loss of inheritance because the expert economist's testimony was "completely airborn, premised as it was on assumptions without basis in the real world of [the decedents]." *Eymard*, 795 F.2d at 1233. The court found "the assumptions of plaintiffs' economist so abusive of the known facts, and so removed from any area of demonstrated expertise, as to provide no reasonable basis for calculating how much of [decedent's] income would have found its way into assets or savings to be inherited by his children." *Id.* at 1235. In reaching its decision, the court found the economist's assumptions that decedent's salary would continue to grow at 8% per year over almost forty years and that he would pay only 5% of his income in taxes throughout his career to be completely incredible and unsupported by the record. In addition, the court found the economist's assumptions of decedents' savings plans to be completely unsupported by the facts. The economist had no objective basis for his assumptions and had completely ignored available facts that the decedents' "disposition of income was idiosyncratic, and evidence that suggested increasingly significant sums had been spent in previous years on gambling junkets to Las Vegas." *Id.*

In the case at bar, plaintiffs' expert witness, Dr. Dillman, based his testimony on, among other things, Schwartz's age, his education and his financial history. Dillman concluded from those proven facts that the pecuniary loss that the Schwartz family would suffer as a result of Schwartz's death was best measured by Schwartz's earning capacity rather than his history of farm earnings. Dillman testified that he prepared his analysis by consulting federal government statistics on work life earnings based on educational level. In addition to the testimony of Dr. Dillman and in further support of his analysis, plaintiff Charlsa Stuckey testified that she and Schwartz realized that because farming was not going well economically, Schwartz might have to switch from farming to another occu-

pation. The jury's award approximates the amount of money Dr. Dillman testified would have been provided by Joe Schwartz for the support of his family.

Defendants contend that the testimony of Stuckey and Dillman is every bit as speculative as the evidence found to be too speculative in *Marks* and *Eymard*. The court disagrees. Evidence of Schwartz's farm income was in the record in the form of testimony about past tax returns. Dr. Dillman testified that he took those figures into account. Dr. Dillman's conclusion that Schwartz's pecuniary contribution to his family was better measured by earning capacity than earnings history is supported by plaintiff's testimony that she and Schwartz had discussed the possible need for Schwartz to change to a new profession and that Schwartz had indicated a willingness to do so in order to support his family. Dillman's computation of Schwartz's earning capacity was supported by Schwartz's level of education and by the testimony of Stuckey and Schwartz's father that Schwartz was a very bright, very capable young man.

The testimony of Dillman, Stuckey, and Schwartz's father is not too speculative to support the jury's verdict. Furthermore, none of their testimony contradicts any known facts as was the case in *Eymard*. The jury could reasonably find from the evidence presented that Schwartz either would have achieved economic success as a farmer or would have changed professions. The jury could reasonably find that Schwartz would have supported his family financially, and that he would, indeed, have done so to the extent of the award it made. Defendants' motion for j.n.o.v. or, alternatively, a new trial on the issue of pecuniary loss is denied.

Non-pecuniary Damages

Defendant further contends that the jury's award to Stuckey for her mental anguish and loss of companionship is excessive and should be reduced or set aside. The Court disagrees. A jury's award of such intangible damages as those at

issue in this case "is not to be disturbed unless it is entirely disproportionate to the injury sustained." *Marks v. Pan American World Airways, Inc.*, 785 F.2d 539, 540 (5th Cir. 1986) (quoting *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983)). Such jury verdicts are vacated only "on the strongest of showings." *Id.* The award must be "so large as to 'shock the judicial conscience,' 'so gross or inordinately large as to be contrary to right reason,' so exaggerated as to indicate 'bias passion, prejudice, corruption, or other improper motive,' or as 'clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to.'" *Id.* (emphasis in original; footnotes omitted).

The cases in which the Fifth Circuit has reviewed a jury award for excessiveness make it clear that both district courts and appellate courts have a duty to review jury awards in light of the facts presented to the jury. *See e.g. Caldarera*, 705 F.2d at 784. The cases also make it clear that the maximum that the jury can properly award is to be determined based on the legal standard delineated above and the facts of each individual case. There is not a Fifth Circuit rule that sets out a fixed maximum recovery figure. *See e.g., Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 920-21 (5th Cir. 1987) (affirming award of $500,000 for loss of husband's love and affection and loss of his household services); *Marks v. Pan American World Airways, Inc.*, 785 F.2d 539, 540-41 (5th Cir. 1986) (affirming $250,000 award per child per parent for loss of love and affection); *Giancontieri v. Pan American World Airways, Inc.*, 767 F.2d 1151, 1157 (5th Cir. 1985) (under facts of case $500,000 was maximum award for loss of love and affection of wife); *Guiterrez v. Exxon Corp.*, 764 F.2d 399, 403 (5th Cir. 1985) (affirming $250,000 award for loss of society and companionship and $750,000 award for mental anguish and distress to surviving parents of an adult child); *Winbourne v. Eastern Airlines, Inc.*, 758 F.2d 1016, 1018 (5th Cir. 1984) *cert. denied*, 474 U.S. 1036 (1985) (affirming $500,000 award for loss of wife's love and affection); *but see Eymard v. Pan American World Airways, Inc.*, 795 F.2d 1230, 1236 (5th Cir. 1986) (indi-

cating that *Caldarera* had established an absolute upper limit on awards for the loss of love and affection of a parent of $300,000).

In *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986), the Texas Supreme Court defined the elements of damages the awards of which Deere contends are excessive in this case. "Mental anguish represents an emotional response to the wrongful death itself." *Id.* at 687. Loss of society "constitutes a loss of positive benefits which flowed to the family from the decendent's having been a part of it." *Id.* at 687-88. In the case at bar, the jury awarded Charlsa Stuckey $400,000 for past and future mental anguish and $200,000 for past and future loss of companionship and society.

The court has reviewed the evidence presented to the jury on these two elements of damages. The record is replete with evidence as to the length and closeness of the *relationship* between Schwartz and plaintiff, the *activities* they shared, her ongoing *horror* as to the manner of his death, her *grief*, and her *continuing sense of loss*. The Court concludes that the jury's awards, while large indeed, are not disproportionate to the injury sustained and are not so large as to shock the judicial conscience. The awards do not exceed that amount to which a reasonable person could feel plaintiff is entitled. Accordingly, defendants' motion for a remittitur or, alternatively, a new trial on damages is denied.

Evidence of Other Accidents

Finally, Deere asks for a new trial on the issues of product defect and exemplary damages because the plaintiffs' evidence of other accidents involving corn harvesting equipment was erroneously admitted. Deere argues that because the circumstances of the other accidents were not known, it cannot be known if the circumstances were similar to the Schwartz accident. Evidence of the other accidents, therefore, was irrelevant, unnecessary, cumulative, and unfairly prejudicial. The Court disagrees. A review of the trial transcript indicates

that the evidence of other accidents was drawn from agricultural and technical publications and was offered to show that Deere could have anticipated that a farmer could be injured using a cornhead. Insofar as the exact circumstances of Schwartz's accident are unknown because he was alone in the field, the lack of knowledge of the circumstances of the other accidents is not important to their relevance. The Court holds that the evidence of other accidents was not irrelevant and, therefore, was not erroneously admitted.

Furthermore, the Court holds that the evidence was not unfairly prejudicial. Testimony about the other accidents was brief and noninflammatory. In addition, the Court has granted judgment n.o.v. on the issue of exemplary damages so that any possible prejudicial effect has been substantially mitigated. Deere's request for a new trial because this evidence was erroneously admitted is denied.

In accordance with this opinion and the jury's verdict, judgment will be entered in favor of plaintiffs and against Deere in the amount of $2,402,970 plus court costs. This award consists of $1,155,000 in pecuniary losses, $350,000 for mental anguish, $350,000 for loss of companionship and society, $70,000 for the conscious pain and suffering of Schwartz, and $477,970 in prejudgment interest calculated pursuant to *Cavnar v. Quality Control Parking, inc.*, 696 S.W.2d 549 (Tex. 1985).

So ORDERED.

Dated this 9th day of November, 1987.

/s/Barefoot Sanders
BAREFOOT
SANDERS
Acting Chief Judge of
the Northern District
of Texas

IN THE UNITED STATES COURT OF APPEALS–
FIFTH CIRCUIT

D.C. Docket No. CA-3-86-0893-H

CHARLSA SCHWARTZ, Individually, and as
Administratrix of the Estate of
HAROLD JOE SCHWARTZ, JR., Deceased, and as
Next Friend of AIMEE NICOLE SCHWARTZ and
AMANDA PAIGE SCHWARTZ,
Minors, Plaintiffs-Appellees, Cross-Appellants,

v.

JOHN DEERE COMPANY and
DEERE & COMPANY,
Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

Before REAVLEY, JOHNSON, and JONES,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and vacated in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bears its own costs on appeal.

October 11, 1988

JOHNSON, Circuit Judge, dissenting.

ISSUED AS MANDATE: Dec. 12, 1988

/s/H. E. Adams, Jr.
Deputy
New Orleans, Louisiana
Dec. 12, 1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1934

CHARLSA SCHWARTZ, Individually, and as Administratrix of the Estate of HAROLD JOE SCHWARTZ, JR., Deceased, and as Next Friend of AIMEE NICOLE SCHWARTZ and AMANDA PAIGE SCHWARTZ, Minors, Plaintiffs-Appellees, Cross-Appellants,

v.

JOHN DEERE COMPANY and DEERE & COMPANY, Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(DECEMBER 1, 1988)

Before REAVLEY, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/Thomas M. Reavley
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1934

CHARLSA SCHWARTZ, Individually, and as Administratrix of the Estate of HAROLD JOE SCHWARTZ, JR., Deceased, and as Next Friend of AIMEE NICOLE SCHWARTZ and AMANDA PAIGE SCHWARTZ, Minors, Plaintiffs-Appellees, Cross-Appellants,

v.

JOHN DEERE COMPANY and DEERE & COMPANY, Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

Before REAVLEY, JOHNSON and JONES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellants for clarification of the Court's opinion of October 11, 1988 is GRANTED. We confirm that the 30% comparative fault reduction applies to all damages awarded in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA-3-86-0893-H

CHARLSA SCHWARTZ, Individually, and as Administratrix of the Estate of HAROLD JOE SCHWARTZ, JR., Deceased, and as Next Friend of AIMEE NICOLE SCHWARTZ and AMANDA PAIGE SCHWARTZ, Plaintiffs

v.

JOHN DEERE COMPANY and DEERE & COMPANY, Defendants

JUDGMENT

On the 10th day of August, 1987, came on to be heard the above cause of action for trial before a jury, and the parties appearing in person and by their attorneys of record announced ready for trial.

At the conclusion of the evidence, the Court submitted its instructions and questions to the jury. The jury returned a verdict on August 17, 1987, incorporated herein by reference, finding for Plaintiffs against Defendants John Deere Company and Deere & Company.

The jury found:

1. That the combine was defectively designed because it lacked a cutoff switch, and that such defect was the producing cause of the injuries suffered by Joe Schwatz;

2. That the cornhead and combine were not defective for lack of warnings;

3. That Joe Schwartz was contributorily negligent and that his negligence was a proximate cause of his injuries;

4. That Joe Schwartz's negligence contributed 30% and Defendants Deere's product contributed 70% to causing Joe Schwartz's injuries;

The jury found the total compensatory damages in the past and future for the Plaintiffs in the sum of $2,750,000.00;

Out of the total damages awarded, each Plaintiff received compensation for past and future damages as follows:

PECUNIARY LOSS

	PAST	FUTURE
Charlsa Stuckey	$100,000.00	$500,000.00
Aimee Schwartz	$ 25,000.00	$500,000.00
Amanda Schwartz	$ 25,000.00	$500,000.00

MENTAL ANGUISH

	PAST	FUTURE
Charlsa Stuckey	$300,000.00	$100,000.00
Aimee Schwartz	$ 10,000.00	$ 40,000.00
Amanda Schwartz	$ 10,000.00	$ 40,000.00

LOSS OF COMPANIONSHIP AND SOCIETY

	PAST	FUTURE
Charlsa Stuckey	$ 50,000.00	$150,000.00
Aimee Schwartz	$ 50,000.00	$100,000.00
Amanda Schwartz	$ 50,000.00	$100,000.00

CONSCIOUS PAIN AND SUFFERING OF JOE SCHWARTZ

$100,000.00

The jury found that Defendants acted with conscious indifference to the rights and welfare of purchasers and users of the cornhead and combine involved, and assessed against

Defendants exemplary damages in the amount of $1,500,000.00.

It appears to the Court that a thirty percent (30%) reduction in the past and future damages as found by the jury, should apply to all past and future actual damages.

It further appears to the Court that prejudgment interest on past damages of Charlsa Stuckey, Aimee Schwartz and Amanda Schwartz accrued at the legal rate of 10% compounded daily from April 5, 1981, until the date this judgment was signed. Prejudgment interest damages as a result of the Decedent's conscious pain and suffering prior to his death accrued at the legal rate of 10% compounded daily from October 5, 1980, until the date this judgment was signed.

It is therefore ORDERED, ADJUDGED AND DECREED that the total principal and past interest, as of November 9, 1987, be apportioned among the Plaintiffs as follows:

	PRINCIPAL		PREJUDGMENT INTEREST		TOTAL
Charlsa Stuckey	$315,000.00	+	$294,404.48	=	$609,404.48
Aimee Schwartz	$ 59,500.00	+	$ 55,609.74	=	$115,109.74
Amanda Schwartz	$ 59,500.00	+	$ 55,609.74	=	$115,109.74
Estate of Joe Schwartz	$ 70,000.00	+	$ 72,346.04	=	$142,346.04

It further appears to the Court that as of November 9, 1987, the prejudgment interest per day on the past damages of Charlsa Stuckey was the sum of $166.96.

It further appears to the Court that as of November 9, 1987, the prejudgment interest per day on the past damages of Aimee Schwartz was the sum of $31.51.

It further appears to the Court that as of November 9, 1987, the prejudgment interest per day on the past damages of Amanda Schwartz was the sum of $31.51.

It further appears to the Court that as of November 9, 1987, the prejudgment interest per day on damages as a result of the decedent's conscious pain and suffering was the sum of $38.99.

It is hereby ORDERED, ADJUDGED AND DECREED that the future damages be apportioned between the Plaintiffs as follows:

PECUNIARY LOSS

Charlsa Stuckey	$350,000.00
Aimee Schwartz	$350,000.00
Amanda Schwartz	$350,000.00

MENTAL ANGUISH

Charlsa Stuckey	$ 70,000.00
Aimee Schwartz	$ 28,000.00
Amanda Schwartz	$ 28,000.00

LOSS OF COMPANIONSHIP AND SOCIETY

Charlsa Stuckey	$105,000.00
Aimee Schwartz	$ 70,000.00
Amanda Schwartz	$ 70,000.00

It is therefore, ORDERED, ADJUDGED AND DECREED that Plaintiffs recover from Defendants John Deere Company and Deere & Company the sum of $1,925,000.00 in actual damages, together with prejudgment interest of $405,623.96 on past damages of Charlsa Stuckey, Amanda Schwartz and Aimee Schwartz calculated at the rate of 10% compounded daily from April 5, 1981, until November 9, 1987; together with prejudgment interest of $72,346.04 on damages as a result of the Decedent's conscious pain and suffering calculated at the rate of 10% compounded daily from October 5, 1980, until November 9, 1987. This judgment does not include exemplary damages.

It is further ORDERED, ADJUDGED AND DECREED that Plaintiffs recover post-judgment interest at the rate of 6.90% from the date of the entry of this judgment, and costs of Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-86-0893-H

CHARLSA SCHWARTZ, Individually, and as Administratrix of the Estate of HAROLD JOE SCHWARTZ, JR., Deceased, and as Next Friend of AIMEE NICOLE SCHWARTZ and AMANDA PAIGE SCHWARTZ, Minors, Plaintiffs

v.

JOHN DEERE COMPANY and DEERE & COMPANY, Defendants

ORDER

Pursuant to the Court's Memorandum Opinion dated November 9, 1987, Defendants' August 31, 1987 motion for Judgment Notwithstanding the Verdict (J.N.O.V.) or, Alternatively, for a New Trial is DENIED except as to the jury award of exemplary damages, which has been set aside and was not included in the Judgment dated November 9, 1987.

SO ORDERED.

DATED: November 10, 1987.

/s/Barefoot Sanders
BAREFOOT SANDERS
ACTING CHIEF JUDGE
Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

— — **CA-3-86-0893-F**

CHARLSA SCHWARTZ, ET AL, Plaintiffs

v.

JOHN DEERE COMPANY ET AL, Defendants

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evi-

dence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respector of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his authority delegated to him by the corporation, or within the scope of his duties as an employee of the corporation.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. Any evidence to which an objection was sustained by the Court, and any evidence ordered stricken from the record, must be entirely disregarded. Also, there may have been some testimony that, at the time it was offered, I told you was admitted for a particular purpose only. You should consider such evidence only for the purpose for which I have allowed it to be admitted, and you should not consider it for any other purpose whatsoever. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What thelawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the Plaintiff or to the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of any expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

The burden is on a party in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of a party's claim by a preponderance of the evidence, the jury should find for the other party as to that claim.

Contentions of the Parties

I will now discuss with you the contentions of the parties to this suit.

A. Plaintiffs' Contentions

This is a product liability case arising from the wrongful death of Harold Joe Schwartz (Schwartz). The products involved are a combine and cornhead manufactured by the defendants, John Deere Company and Deere & Company (Deere).

The plaintiff, Charlsa Schwartz Stuckey (Stuckey), brings this action as the surviving spouse and Administratrix of the Estate of Harold Joe Schwartz, and as Next Friend of Aimee Nicole Schwartz and Amanda Paige Schwartz, minor children of the deceased. Plaintiffs contend that the cornhead and the combine were defective for lack of adequate warning. Plaintiffs also contend that the combine was defectively designed because it lacked a cut-off switch.

As a result of Schwartz's injuries and death, Stuckey seeks damages, individually and in her capacity of Administratrix and as Next Friend, to compensate for the loss of Schwartz's earning capacity from the past and future; to compensate for past and future mental pain and anguish. Stuckey also seeks damages to compensate Schwartz's estate for his conscious physical pain and mental anguish suffered before his death as a result of the occurrence in question. Finally, because plaintiffs contend that Deere knew of the defects presented by their products, but did nothing to eliminate or reduce such hazards, plaintiffs seek exemplary damages.

B. Defendants' Contentions

Deere denies that the combine and cornhead involved in Schwartz's accident were the producing cause of Schwatz's injury or that they were defectively designed or manufac-

tured. Deere also contends that the combine and cornhead had adequate warnings and instructions at the time of their sale.

Deere further alleges that Schwartz voluntarily exposed himself to a known danger posed by the cornhead with knowledge and appreciation of that danger. Specifically, Deere contends that Schwartz disregarded the warnings placed upon the cornhead and that he voluntarily exposed himself to an obvious danger, in that he failed to shut off the equipment. Deere alleges that such conduct was the sole proximate cause or a proximate cause of the injuries complained of.

(1) Design Defect

Many products as designed have both utility and danger involved in their use. A product is "defectively designed" when the product is unreasonably dangerous as designed for any of its foreseeable uses, whether they be intended uses or unintended uses, taking into consideration the utility of the product and the risk involved in its use. Put another way, such a product is unreasonably dangerous as designed if its utility does not outweigh the magnitude of the danger inherent in its introduction into commerce.

A showing of design alternatives which would have prevented the accident or minimized its consequences does not necessarily establish that the product is unreasonably dangerous. It is one thing to show that a manufacturer might have designed a safer product, but quite another to show that the product he did design was unreasonably dangerous. A manufacturer is not obligated to design the safest possible product or one as safe as others make or a safer product than the one in question. Rather, the manufacturer's obligation is to adopt a design which is reasonably safe for any of its foreseeable uses.

You will be called upon to determine whether the combine in question was defective because it lacked a cut-off switch. See Question No. 1.

(2) Warning or Instructions

A manufacturer has the duty to adequately warn of potential dangers in the use of its product of which it knows or should know. A product is not defective for lack of adequate warnings and/or instructions unless the lack of adequate warnings and/or instructions renders the product unreasonably dangerous. A product is unreasonably dangerous as marketed if the ordinary man, knowing the risks and dangers actually involved in its use, would not have marketed the product without supplying more information about the risks and dangers involved in its use and the way to avoid harm therefrom.

An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with ordinary knowledge common to the community as to the product's characteristics.

"Adequate warnings and instructions" are defined as warnings and instructions that are given in such form that they could reasonably be expected to catch the attention of the reasonably prudent person in the circumstances of the product's use; and the content of the warnings and instructions must be of such a nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger and how to avoid it to the mind of a reasonably prudent person.

In considering whether the manufacturer knew or should have known of the danger, the manufacturer is held to the knowledge and skill of an expert in the field. The manufacturer's status as an expert means that he has a duty to test and inspect his product. The extent of research and experiment must be commensurate with the dangers involved. A product msut not be made available to the public without disclosure of those dangers that the application of reasonable foresight would reveal.

In a situation where the ultimate user of the product did not purchase the product directly from the manufacturer, the obligation of the manufacturer is to issue warnings or instructions which are reasonably calculated to reach the ultimate user. The presence of an intermediate party does not by itself relieve the seller of this duty. The adequacy of a warning should be evaluated in light of the knowledge and expertise of those who may reasonably be expected to use the product.

You will be asked to determine whether the cornhead and the combine were defective for lack of adequate warning. See Question No. 2.

(3) Manufacture

In order for a user in a products liability action to recover from a manufacturer, the user must first trace the product causing injury to the manufacturer. Deere admits it manufactured the combine and cornhead in question, so this is not a disputed issue in this case.

(4) Producing Cause

In order to recover under the theory of strict liability, a user must also prove that the defective product was a producing cause of physical harm to him.

By the term "producing cause" is meant an efficient, exciting, or contributing cause, which, in a natural and continuous sequence, in connection with any other cause or causes, produced the event complained of. There may be more than one producing cause of an event.

(5) Contributory Negligence

In addition to denying that any conduct of Deere caused any injury or damage to Schwartz, Deere alleges, as a further defense, that some contributory negligence on the part of Schwartz himself was a proximate cause of any injuries and consequent damages plaintiffs may have sustained. Contrib-

utory negligence is fault on the part of a person injured, which cooperates in some degree with the conduct of another, and so helps to bring about the injury.

By the defense of contributory negligence, Deere in effect alleges that, even though Deere may have been guilty of some act or omission which was one of the producing causes, Schwartz himself, by his own failure to use ordinary care under the circumstances for his own safety, at the time and place in question, also contributed one of the proximate causes of any injuries and damages plaintiffs may have suffered.

The burden is on Deere, alleging the defense of contributory negligence, to establish, by a preponderance of the evidence in the case, the claim that Schwartz himself was also at fault, and that such fault contributed one of the proximate causes of any injuries and consequent damages the plaintiffs may have sustained.

By the term "proximate cause" is meant a cause which in a natural and continuous sequence produces an event and without which the event would not have occurred. To be a proximate cause of an event it should have been reasonably anticipated and foreseen by a person of ordinary prudence in the exercise of

Damages

If you find that the combine and cornheader were in an unreasonably dangerous condition by virtue of their design or due to a lack of adequate warning, and that such condition was a producing cause of the accident, then you must determine what damages to award Stuckey and her children, Aimee, and Amanda for the loss suffered on account of Schwartz's death. You shall award such sum of money, if any, that you find from a preponderance of the evidence would, if paid now in cash, fairly and reasonably compensate the plaintiffs for their pecuniary loss produced by the occurrence in question, and you shall apportion the damages found by you between the plaintiffs in the form of verdict that will be given to you for this

purpose. In this connection, you are instructed that the term "pecuniary losses" means not only the loss of actual money that the deceased would have contributed to the plaintiffs had he lived, but everything that may be valued in money, as hereinafter instructed.

In determining the pecuniary loss to Stuckey and her children, Aimee and Amanda, you are instructed that you will award that sum of money, if any, that you find from a preponderance of the evidence would, if paid now in cash, fairly and reasonably compensate them for their pecuniary loss resulting from the death of Schwartz. In determining such pecuniary loss, if any, you are instructed that you shall consider the following elements of damage, and none other: the care, maintenance, support, services, advice, counsel, and contributions of pecuniary value that Stuckey would in reasonable probability have

You are further instructed that the medical expenses and funeral expenses incurred by the plaintiffs as a result of the accident in question, have been stipulated to by the parties, and should not be considered by you in arriving at the amount of damages.

Your verdict in this case will consist of the answers you make to the following questions.

Question No. 1

Do you find from a preponderance of the evidence that the combine was defectively designed because it lacked a cut-off switch and that such defect was a producing cause of the injuries suffered by Schwartz?

Answer "We do" or "We do not."

ANSWER: We do

Question No. 2

Do you find from a preponderance of the evidence that the cornhead and the combine were defective for lack of adequate

warning and that such defect was a producing cause of the injuries suffered by Schwartz?

Answer "We do" or "We do not."

ANSWER: We do not

If you have answered either Questions Nos. 1 or 2 "We do," then answer Question No. 3.

Question No. 3.

Do you find from a preponderance of the evidence that Schwartz was contributorily negligent and that such negligence was a proximate cause of his injuries?

Answer "We do" or "We do not."

ANSWER: We do

If you have answered Question No. 3 "We do," then answer Question No. 4.

Question No. 4

For each party found by you to have caused Schwartz's injuries, find by a preponderance of the evidence the percentage caused by:

Schwartz:	30 %
Deere:	70 %
Total:	100%

You are instructed that the percentage of causation attributable to a party or product is not necessarily measured by the number of acts, omissions, or product defects found. The percentages you find must total 100 percent.

If you have answered questions No. 1 or No. 2 "We do," then answer Question No. 5.

Question No. 5

What do you find from a preponderance of the evidence is the sum of money, if paid now in cash, would fairly and reason-

ably compensate the plaintiffs for the following (answers in dollars and cents, if any):

(A) The pecuniary loss of Charlsa Stuckey and her children Aimee and Amanda suffered as a result of the death of Schwartz from the date of death until today and in the future?

	Date of death until today	Future
ANSWER:		
Stuckey:	$100,000.00	$500,000.00
Aimee:	$ 25,000.00	$500,000.00
Amanda	$ 25,000.00	$500,000.00

(B) The mental anguish of Charlsa Stuckey and her children suffered as a result of the death of Schwartz?

	Date of death until today	Future
ANSWER:		
Stuckey:	$300,000.00	$100,000.00
Aimee:	$ 10,000.00	$ 40,000.00
Amanda	$ 10,000.00	$ 40,000.00

(C) The loss of companionship and society Charlsa Stuckey and her children suffered as a result of the death of Schwartz?

	Date of death until today	Future
ANSWER:		
Stuckey:	$ 50,000.00	$150,000.00
Aimee:	$ 50,000.00	$100,000.00
Amanda	$ 50,000.00	$100,000.00

(D) The conscious pain and suffering suffered by Schwartz before his death as a result of his accident?

ANSWER:

Schwartz: $100,000

If you answered either Questions 1 or 2 "We do," then answer Question No. 6.

Question No. 6

Do you find from a preponderance of the evidence that such conduct on the part of Deere, if any, was with conscious indifference to the rights and welfare of purchasers and users of the cornhead and combine?

Answer "We do" or "We do not."

ANSWER: We do

If you have answered Question No. 6 "We do," then answer Question No. 7.

Question No. 7

What sum of money, if any, do you find from a preponderance of the evidence should be assessed against Deere as exemplary damages?

Answer in dollars and cents, if any.

ANSWER: $1,500,000.00

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest con-

viction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesperson here in court. The foreman or forewoman or any other juror who observes a violation of the Court's instruction shall immediately warn the one who is violating the same and caution the juror not to do so again.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the Judge. If it should be found that you have disregarded any of these instructions, it could be jury misconduct and it may require another trial by another jury; then all of your time will have been wasted.

A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman or forewoman fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

We, the jury, have answered the foregoing questions and return the same as our verdict in this case.

Date: August 17, 1987

/s/[signature illegible]
Foreperson

DIRECT EXAMINATION EXCERPTS:

MS. TURLEY: Plaintiff's call Dr. Edward Dillman, your Honor.

DR. EDWARD DILLMAN (Witness sworn)

DIRECT EXAMINATION

BY MS. TURLEY:

Q. Would you state your full name, please sir?
A. Everett G. Dillman.

* * *

Q. What is your business?
A. I'm an economist, and I'm President of International Business Examiners Incorporated.

* * *

Q. Could you describe for the Court what sort of academic training you have had?
A. I have a bachelor in business from the University of New Mexico in Albuquerque. I have a master's in business from the same school. I have an additional year of graduate work, and finally I have a doctorate from the University of Texas at Austin.
Q. I understand, Doctor, from time to time you have written articles and published work relating to economics.
A. Yes, ma'am.
Q. Have you also taught economics to others?
A. Well, I have taught at the university. I have taught statistics and mostly a course called business policy which is an integrated course that tries to put together all the areas of business in economics that the students have been exposed to prior to graduation, trying to make practical sense of the theory. I also teach courses for the American College of Vocational Experts. I teach a course on the economic interface with the vocational areas.
Q. And are you still teaching today?

A. No, I have retired from the University of Texas at El Paso as a full professor. I retired in May of 1985. I taught for many years.

Q. Tell us a little bit more about the business and economic consulting you do. You mentioned a bit about it generally.

A. Well, again we do studies for businesses. We try to make projections. In doing almost any type of business consulting you are concerned about what's happening in the future. So if a business man comes to me and says I'd like to start an activity over here in a new state or new city or a different part of town, I'll have to go over there and look and see not only what's there now but what we could anticipate to be there five years from now or ten years from now, and I have to go in and develop what we call a model. It's actually just a projection to see if certain things occur, and if we do things a certain way, what would we expect to have in terms of our income, and just because we have income doesn't mean that it's going to be worthwhile because we may have other uses for that income. So the question is what is that income really worth to us, and we do some type of financial analysis to see whether it's really worthwhile going into that venture.

Q. You mentioned a portion of your work involves economic analysis with respect to individuals. Is that related to the economic impact on a family because of a serious injury or the death of a family member?

A. Yes, ma'am.

Q. Did I ask you to do such an evaluation in this case?

A. Yes, ma'am.

Q. Could you give us an idea, Dr. Dillman, of how many economic evaluations of that sort you have done over the years?

A. Well, in the last twenty-two years I been doing this, I been retained on about forty thousand five hundred different cases.

Q. When you do an economic analysis, is that a recognized science or discipline that you are applying or just Dr. Dillman's method of calculation?

A. No, the methodology is relatively standard. It's used in analyzing businesses as well as analyzing people, but the methodology has been pretty well developed and utilized for the development of technical terms, the value of human capital over quite a number of years.

Q. Would you tell us generally what you do in such an economic analysis?

A. Well, there are really only four things that need to be done. The first thing we have to determine is how long or over what period of time the analysis is to be made, and for that we go to tables published by the U.S. Government or make some other assumptions. One set of calculations is made over life expectancy. That's the average number of years an individual at a given age would be expected to live. Other calculations for working earnings are made over what we call worklife, the number of years the person would have the ability to work. There is one value from a table. It's called mean years from the final separation of labor force. It takes into consideration the probability of early death or retirement or illness or accidents. Another alternative is a calculation to age seventy because early retirement doesn't reduce one's capacity. If you stay healthy at age seventy you ought to be able to work that long. Seventy is considered a working age. So that's one thing we do. The second thing we do is we have to establish a basis on which to make our calculations. Well, the best base for a person who's been in the labor force for a long time, the first thing we look at is what the person earned in the past. We look at it and that gives you a pretty good idea of what might happen in the future. Sometimes that doesn't work. Sometimes a person's earnings in the past do not reflect their ability, their capacity. So we have to look at a number of different things—their age including the type of work they were doing and so on. This third thing we do is we have to make adjustments over time to allow for the fact that any wages would be expected to increase. They increase because of what's sometimes called inflationary increases. It's

really the fact that wages in general on the average increase because of the productivity in the economy. They may increase because a person as he gets older gets better jobs and goes up the ladder so to speak. That's called individualized increases. But anyway, we have to take those into consideration. The fourth thing we have to do is to take into consideration that if you had any money today in a lump sum that money can be invested and earn interest, and you have to make sure the lump sum plus the interest equals the amount that the person would have, say, earned each year, and at the end of the worklife it would be all gone. Now, as a practical matter in the third and fourth step we do this one step. We look at the difference between wage increases and interest rates, and they offset to a great extent but not completely. Wages increase about two-thirds percent than the –

Q. Let's talk about the Schwartz family and what you did in this case. First, did I ask you to look at some facts related to the economic loss?

A. Yes, ma'am.

Q. And have you been able to reach conclusions and opinions as to the economic impact on the Schwartz family as a result of Joe Schwartz's death?

A. Yes, ma'am.

Q. Doctor, first, let's tell the jury some of the materials that you have looked at, that you thought were helpful or necessary in arriving at your conclusions.

A. I had certain basic personal information – date of birth, date of death and the education. That kind of background information about Mr. Schwartz.

Q. Do you understand that Mr. Schwartz was a farmer?

A. Yes, ma'am.

Q. And in addition to the specific personal information you were provided, did you consult any government publications?

A. Oh, yes, I consulted a life table. I used the latest U.S. Life Table to determine life expectancy and the table called Medium Years to the Final Separation from Work Force to determine labor life. And I also con-

sulted as additional information the income tax records. I reviewed those.

* * *

Q. Going back to the Schwartz family and the materials you reviewed in this case, did you review the income tax returns?

A. Yes, I did.

Q. Would you tell us what the income tax returns showed for the last three, four years of Mr. Schwartz's life?

A. The income tax showed deficits for the last four years. Actually in 1980 the year of his death – And true he had only lived nine months and a couple of days so it may not be fully reflective of his activities, but still it showed a two hundred thousand dollar loss. Showed a net seventeen thousand dollar loss in 1979 and something like almost forty thousand dollars until 1978. It showed a lot of losses.

Q. What do the losses tell you in terms of Mr. Schwartz's earning capacity?

A. Well, it showed me that he obviously was not earning at his capacity. Capacity means ability. He had these losses, and if we were just to look at these losses we would conclude that what he actually had is a negative capacity, and that's not true. My understanding is he had a master's degree in farming. He had the ability to go out and earn money in some other way, although that obviously was not being demonstrated and hasn't been demonstrated for the years for which I had the tax returns. So I utilized another method. I said he would have the ability or capacity to earn at the average rate of a male with five years or more of college.

Q. And you picked the five years or more of college based upon what?

A. Based upon the fact that he has a master's degree he falls into that statistical group.

Q. As part of your analysis, did you need to determine Mr. Schwartz's age at the time of his death?

A. Yes, ma'am, 29.29 years of age.

Q. In addition to considering his education, did you consider his marital status?
A. Yes, that he was married.
Q. Did you learn anything else about his family?
A. He was married and had two daughters.

* * *

Q. What did you assume to be Mr. Schwartz's life expectancy at the time of his death?
A. 44.51 years of age of life expectancy.
Q. In addition to the twenty-nine?
A. Yes, ma'am, the life expectancy is the number of additional years one would have.
Q. And what did you find to be Mrs. Schwartz's life expectancy at the time of her husband's death?
A. 57.4 years.

* * *

Q. You explained to us earlier what work life expectancy was and how you derived that figure. In addition to making an assumption as to Mr. Schwartz's life expectancy, did you make a determination as to his work life expectancy?
A. Yes, medium life to final separation from the labor force would be 32.2 one additional years or in the alternative to age 74.71 years.
Q. Now, in doing your calculations what did you assume as Mr. Schwartz's earnings range or level at the time of his death?
A. Well, I assumed his earnings level was negative. His earning capacity would be equivalent to that of the average male with five or more years of college, and there is data published by the U.S. Census Bureau as to what that is, and that's what I used.
Q. Taking the basic facts that you have just outlined for us, Dr. Dillman, what was the next step in your analysis?
A. What I did was I took the data that was published by the Census Bureau as to earnings by education. I took this – This is by age group, and I estimated between each age group the amount for each age. I

subtracted from that what we call personal maintenance, the amount he would have had to have spent for himself, personal food and medical care, and I then adjusted this over time to allow for the anticipated wage increases, and at the same time I discounted it to present value. I did that by holding the wage increases to zero and discounting by the net difference of sixty-six hundredths of one percent. Then when I calculated, I added fifteen percent fringe benefits as the average fringe benefits that occur in society. That would be mostly the employer's contribution to Social Security but has pension plans and health and welfare, health insurance plans and that sort of thing.

Q. Can you explain to us what you were trying to do or the purpose of your analysis? What were you trying to demonstrate or calculate?

A. I was trying to show what his earning capacity or ability would have been over his worklife less what he would have had to spend on himself for personal maintenance, that the remainder would be the fund out of which could be considerations to the family unit.

Q. Dr. Dillman, could I get you to step down, please, sir. If you were to have assumed that Mr. Schwartz worked only to his worklife expectancy, what was his earning capacity from the date of his death through his worklife expectancy?

A. Well, I am going to break this into past, future and total.

Q. The past refers to what, Dr. Dillman?

A. From the time of death up to the current time, about six and a half years.

And we have earnings capacity and to worklife expectancy, the total amount would be $1,215,543. Do you want me to break these down?

Q. If you will, please.

A. The past would be approximately $206,169, and the future a little over one million dollars, $1,009,379.

Q. And this is if he worked to his worklife which would have been what age?

A. That would have been through age sixty or sixty-one, maybe sixty-two.
Q. Could I get you to label this as worklife?
A. It is.
Q. Okay. I didn't see it there. Did you also calculate Mr. Schwartz's earning capacity had he continued to work to age seventy?

MR. SAYLES: Just a moment. I object to any projections to age seventy as being speculative. Worklife expectancy based upon published tables, but going beyond the worklife tables is speculation, and I object to it on those grounds.

THE COURT: Overruled.

BY MS. TURLEY:

Q. To age seventy what is Mr. Schwartz's earning capacity?
A. The past would be exactly the same of course because the only difference would be going a few more years in the future. The future would be $1,319,238 making a total of a little over million and a half, $1,525,407.
Q. Now, in addition to calculating earning capacity did you make any other calculations with respect to the impact on the family?
A. Yes, ma'am, I made the calculations as to household services.
Q. What do you mean by household services, Dr. Dillman?
A. These are the chore-type activities that the person would perform in and around the house for the household benefit. They may be working on the yard or car or doing a little painting or plumbing. Maybe helping clean now and then, going shopping – those sort of things, and I completed just based upon a factor of ten hours a week – I don't know how many hours a week that Mr. Schwartz would have normally performed it – then I evaluated federal minimum wage. If the jury should find then it would be that amount or one-tenth of that, and twenty, twice that amount.

Q. Would you write for us on the chart assuming only ten hours per week of household services?

A. If it were to average ten hours a week over his life expectancy, in the past would be $11,193, and the future would be $59,635 making a total of $70,828.

Q. For each ten hours?

A. Yes, ma'am.

Q. And if the evidence were to show that he spent more than ten hours with the household services the number would be multiplied. And if it were less?

A. Yes, one hour would be one-tenth of this.

Q. Can you explain to us why you assigned a value to household services?

A. Why I assigned a value?

Q. Why did you calculate household services?

A. Because they have value. The activities have economic value, even though somebody doesn't actually pay the husband for fixing the car or pay the wife for cleaning. You might say if that person didn't do it somebody else would do that, and if somebody else wasn't a family member, then they would have to be paid. But every constructive effort has value, and that value I assigned the lowest amount is federal minimum wage, and that's what I assigned here.

* * *

MS. TURLEY: Pass the witness, your Honor.

Supreme Court, U.S.
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No. 88-1438

In The

Supreme Court of the United States

October Term, 1988

CHARLSA SCHWARTZ, et al.,

Petitioners,

v.

JOHN DEERE COMPANY and
DEERE & COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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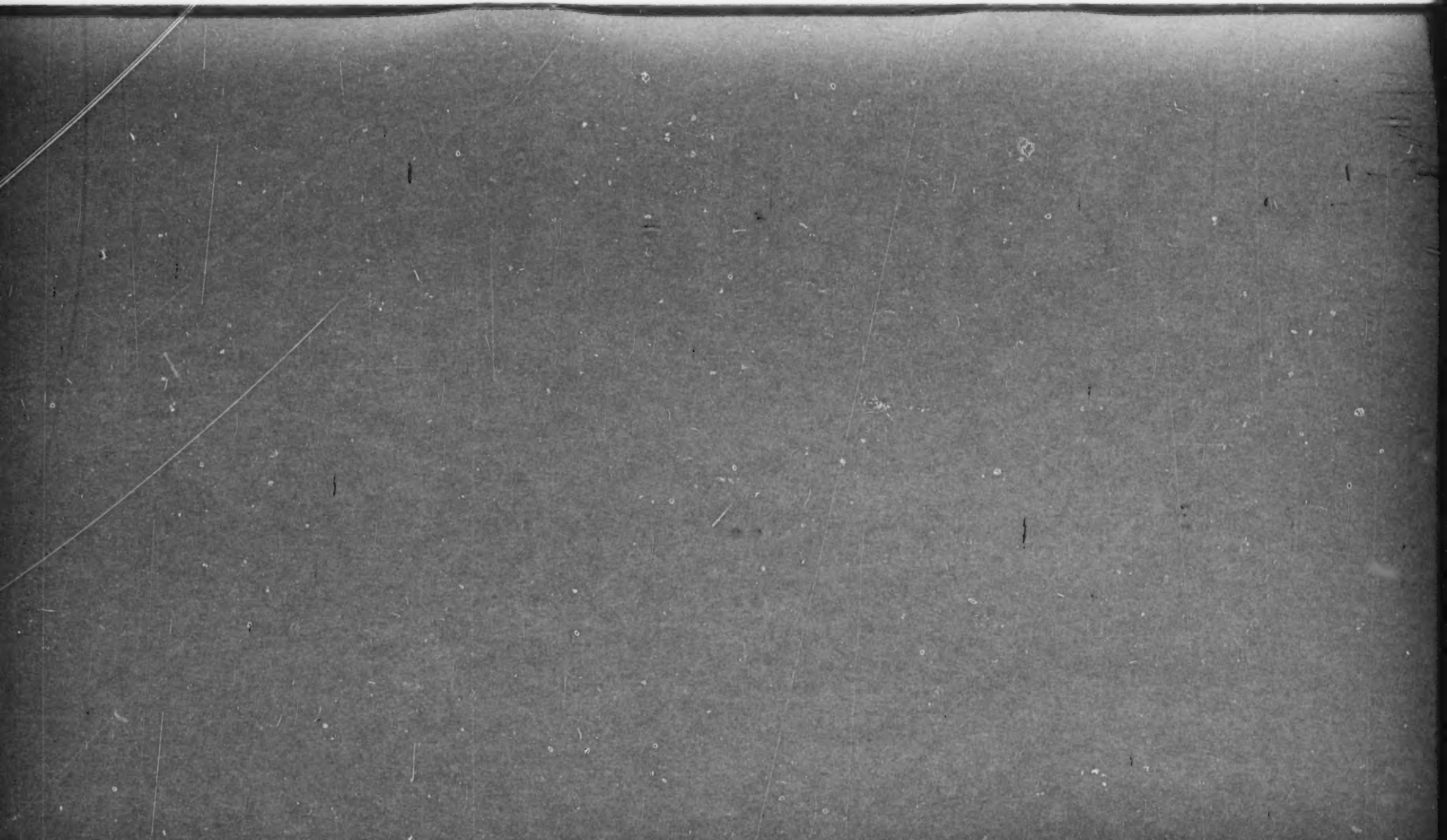

QUESTIONS PRESENTED

1. Did the Court of Appeals evaluate Petitioners' economist's testimony consistently with the law of other circuits?

2. Did the Court of Appeals correctly conclude that Petitioners' economic testimony was unsupported by record fact and provided no basis for the jury's award?

3. Do Petitioners' attacks on the lower courts' decisions raise a credible Seventh Amendment argument?

4. Did the District Court properly grant judgment notwithstanding the verdict because the evidence did not support an award of exemplary damages under Texas law?

5. Did the Court of Appeals act within its discretion in remanding for a new trial of both pecuniary and nonpecuniary damages?

LIST OF PARTIES

1. Charlsa Schwartz Stuckey, Individually and as Administratrix of the Estate of Harold Joe Schwartz, Jr.
2. Aimee Schwartz
3. Amanda Schwartz
4. John Deere Company

   The parent company of John Deere Company is Deere & Company.
5. Deere & Company

   Subsidiaries and affiliates, other than wholly-owned subsidiaries, of Deere & Company:

   Amerequip Corporation

   Bunton Company

   Deere Hitachi Construction Machinery Corporation

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No. 88-1438

In The

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CHARLSA SCHWARTZ, et al.,

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v.

JOHN DEERE COMPANY and
DEERE & COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondents respectfully request that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

A. The Cause of Action

On October 5, 1980, Joe Schwartz, Jr. became entangled in the intake machinery of a John Deere cornhead and combine, and died as a result of his injuries.

Although there were no eyewitnesses to the accident, Tr. 79, Petitioners' testifying engineer believed that the machine had clogged with cornstalks, Tr. 160, that Mr. Schwartz had been attempting to manually unclog the machine, and that the cornstalk had come free and pulled Mr. Schwartz into the machinery.

Petitioners filed a wrongful death and survivorship suit against Respondents John Deere Company and Deere & Company (collectively "Deere") in the United States District Court for the Northern District of Texas, Dallas Division, based on diversity of citizenship. Petitioners asserted that Deere was liable for Mr. Schwartz's death under Texas strict tort liability theories of defective design and inadequate warning. They also sued for exemplary damages under the Texas case of *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981), which requires a finding that a defendant "was consciously, i.e., knowingly, indifferent to [plaintiff's] rights, welfare and safety." *Id.* at 922.

B. The Evidence

As Petitioners state, Petition at 3, Deere was aware that the products involved in the accident were dangerous to users who attempted to manually unclog them. Deere never disputed this at trial. *See, e.g.*, Tr. 91, lines 22-24. In fact, it was uncontested that Deere had labeled the machinery with several warnings specifically instructing users not to attempt to unclog the machine while it was running. Tr. 154-56.

Petitioners' Statement of the Case incorrectly suggests that Deere knew not only that its combine was

dangerous, but also that it had an available safety device that it deliberately chose not to use. Deere was in fact the owner of the patent to an automatic cutoff switch used on lawnmowers and garden tractors. Petitioners' statement that such a switch "would eliminate the snap roll hazard", though, refers only to the opinion of Petitioners' testifying engineer, John Sevart, and not to any admission by Deere. No evidence was introduced that *Deere* believed that a cutoff switch would be effective to prevent accidents on combines as well as garden equipment.

Similarly, Petitioners' inflammatory comment that Deere "chose not to provide protection for farmers", Petition at 3, is groundless. There is no evidence in the record that Deere believed it had not provided farmers with protection; that Deere thought a cutoff switch would provide additional protection; or that Deere deliberately decided not to use a cutoff switch for combines.[1] Petitioners called no present or former Deere employees to

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[1] The proposition that a safety device used on garden tools will be equally effective for farm equipment is far from self-evident. Farmers might have considered cutoff switches so burdensome that they would manually disable them, thus rendering them ineffective. Plaintiffs' engineer agreed that if a safety feature was "such a nuisance as to lead the user to defeat it, [it] is not a safety feature at all and in all probability may reduce safety." Tr. 162.

The lack of evidence that Deere knew or believed that a cutoff switch would be effective to prevent combine accidents, or that it made any conscious decision not to place a safety device on the combine, is critical to the lower courts' disposition of Petitioners' claims for exemplary damages under Texas law.

testify about Deere's knowledge or decision processes. All that appears in the record is that the involved combine did not have a cutoff switch.

Petitioners' "evidence" of damages from the loss of Mr. Schwartz's pecuniary support consisted almost entirely of the testimony of economist Everett Dillman. Dr. Dillman, in concluding that Mr. Schwartz would have provided $1,525,000 in future earnings to his family,[2] expressly stated that the only fact in the record on which he was relying was Mr. Schwartz's master's degree in farming. Tr. 239. Dr. Dillman then simply multiplied Mr. Schwartz's future life expectancy, as predicted by standard statistical tables, by the average wages earned by all male Americans with five or more years of college – including doctors, lawyers, and M.B.A.'s – as reflected in other statistical tables. Tr. 219-20, 239.

Dr. Dillman deliberately chose to ignore Mr. Schwartz's earnings history, which showed that Mr. Schwartz had lost money in each of the three years preceding the accident, including a loss of $202,633 in just the first nine months of 1980. Tr. 230-31. Mr. Schwartz had never netted more than $15,000 per year from farming. Tr. 229-31. Nevertheless, based only on his statistical tables, Dillman ventured that Mr. Schwartz would have provided his family with over $29,000 in support in 1981, and would have enjoyed steady and constant increases in income for the next thirty years. Tr. 235-36. Although Dillman readily admitted that Mr. Schwartz would not have achieved these remarkable earnings had he remained a farmer, Tr.

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[2] Dillman also testified that the value of Schwartz's future household services was $70,000.

235, there was no evidence in the record that Mr. Schwartz was planning to change jobs.[3]

C. The Verdict and Disposition

The jury found that although Deere had provided adequate warnings, the farm machinery was defectively designed. The jury also found that Joe Schwartz's negligence was a 30% contributing cause of his death. Petitioners were awarded pecuniary loss damages totalling $1,650,000, a figure nearly identical to that proposed by their economist. The jury awarded nonpecuniary damages of $1,100,000, which included a $100,000 survivorship award to Mr. Schwartz's estate. Finally, the jury found that Deere had acted with "conscious indifference" and awarded $1,500,000 in punitive damages. *See* Petitioners' Appendix, H-10 to H-13.

Deere timely moved for a new trial or judgment non obstante veredicto. R. 268-80. The district court granted Deere's motion for J.N.O.V. as to the jury's finding of conscious indifference, stating: "There was simply no

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[3] Charlsa Schwartz Stuckey testified that the Schwartzes had never specifically decided to change professions, and that they wanted to stay in farming "as long as [they] could." Tr. 291. There was no evidence presented of how long the Schwartzes "could" have continued to farm, nor any evidence of specifically what they would have done had they stopped farming. The undisputed evidence was that Mr. Schwartz was trained and educated to be a farmer and that was all he had ever done in his life. Tr. 304. Three years prior to his death the Schwartzes purchased their own farm and Mrs. Stuckey admitted that it was her husband's intention "to make it as a farmer." Tr. 306.

evidence of any acts or omissions by Deere that could reasonably give rise to an inference that Deere was consciously indifferent to the rights and safety of people in the field." Petitioners' Appendix, B-4. The court set aside the $1.5 million exemplary damage award, reduced all remaining damages by 30% in accordance with the comparative fault finding, and entered judgment for Petitioners in the principal sum of $1,925,000.

Deere appealed to the Court of Appeals for the Fifth Circuit, principally attacking the pecuniary-loss award as unsupported by the record and the nonpecuniary-loss award as excessive in part. Petitioners cross-appealed from the J.N.O.V. denying them exemplary damages.

The Court of Appeals affirmed the jury's finding of liability, the $100,000 award for survivorship damages, and the district court's denial of punitive damages. It reversed the pecuniary loss award, finding that Petitioners' economic evidence was so lacking that "[a]ll the jury could do was guess." Petitioners' Appendix, A-6. The court, finding that there was likely to be confusion among jurors if pecuniary damages were tried separately, vacated the nonpecuniary award as well and remanded for a new trial of Petitioners' claims for actual pecuniary and nonpecuniary damages. *Id.*

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The Fifth Circuit's reversal of Petitioners' pecuniary-loss award neither conflicted with the decisions of other

circuits nor misapplied Federal Rule of Evidence 703. The decision, rather, merely followed the well-settled principle that a jury verdict cannot stand if based solely on speculation and conjecture – even speculation and conjecture offered by a purported expert. The Court of Appeals correctly held that Petitioners' economist's opinion was not based on the record facts, and thus could not support a jury award of over $1.6 million.

The lower courts were entitled to, and properly did, set aside the punitive damages award because the record evidence did not satisfy Texas caselaw standards for such an award. The Court of Appeals was well within its discretion in ordering a new trial of both pecuniary and nonpecuniary damages. Petitioners have unsuccessfully attempted to conjure a Seventh Amendment violation out of these everyday exercises of judicial discretion.

ARGUMENT

I. The Fifth Circuit's Reversal of the Pecuniary Damages Award Was Consistent With The Law of Other Circuits and Correct on the Merits.

Petitioners, through selective and misleading citations, contend that the Fifth Circuit has adopted an interpretation of Rule 703 not followed in other circuits, and that the decision below would thus have been different if made by another Court of Appeals on the same facts. Petitioners are wrong. Like other circuits, the Fifth Circuit applies a limited and deferential standard of review to the *admission* of expert testimony; like other circuits, the Fifth Circuit will nevertheless give no weight to expert

testimony that is speculative and without factual support in the record. As other circuits have frequently done, the Fifth Circuit here correctly reversed a jury award based solely on such speculative testimony.

A. Fifth Circuit Caselaw Is Consistent With That of Other Courts

Rule 703 states that an expert's opinion is admissible even if based on inadmissible underlying data, so long as that data is "of a type reasonably relied on by experts in the field." Petitioners, at page 5 of their Petition, cite cases from the Third, Sixth, Seventh, and Tenth Circuits that restate this rule. Contrary to Petitioners' arguments, however, the Fifth Circuit has frequently applied the same principle. *See, e.g., Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 915 (5th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1476 (1988); *Bauman v. Centex Corp.*, 611 F.2d 1115, 1120 (5th Cir. 1980). In these and other cases, the Fifth Circuit has deferred to the trial court's ruling that an expert's testimony was based on facts reasonably relied on by other experts, and thus admissible.

At the same time, the Fifth Circuit has consistently held that an expert's opinion may not be based on mere speculation and conjecture if it is to provide any support for a jury's verdict. The Fifth Circuit cases cited by Petitioners at pages 6-7 of their Petition[4] hold no more than this. In *Marks* and *Eymard*, two wrongful-death cases, the

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[4] *Viterbo v. Dow Chemical Co.*, 826 F.2d 420 (5th Cir. 1987); *In re Air Crash (Eymard v. Pan American World Airways)*, 795 F.2d 1230 (5th Cir. 1986); *Marks v. Pan American World Airways*, 785 F.2d 539 (5th Cir. 1986).

court found that an economist had improperly projected lost-inheritance damages without any consideration of the actual circumstances of the surviving families. In *Viterbo,* the court affirmed a summary judgment for a product-liability defendant because the plaintiff's expert had pointed to no reliable record evidence to support his bald assertion that the defendant's product had caused plaintiff's illness.

Neither these cases nor the opinion below imposes a "subjective standard" (Petition, p. 7) on Rule 703, or purports to permit an appellate court to freely reevaluate an expert's credibility.[5] They merely point out the obvious: that an expert opinion is insufficient to support a verdict when it is "completely airborn, premised . . . on assumptions without basis in the real world of [the record]." *Eymard,* 795 F.2d at 1233; *see also Viterbo,* 826 F.2d at 422.

If, as Petitioners contend, the Fifth Circuit has somehow struck out on its own, one would expect to find conflicting decisions from other circuits upholding verdicts based on expert testimony without record support. The reported decisions, however, uniformly reject such evidence. Most notably, the Third Circuit, in two opinions issued after Petitioners' flagship *Japanese Products* case,[6]

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[5] Petitioners make much of Judge Higginbotham's critical commentary on expert testimony in *Eymard,* 795 F.2d at 1233-34. *See* Petition, pp. 6-7. Those observations were clearly dicta, and were not relied on as a basis for decision either in *Eymard* itself or in any subsequent Fifth Circuit case.

[6] *In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 238 (3rd Cir. 1983), *rev'd,* 475 U.S. 574 (1986).

has expressed disapproval of unsupported expert testimony. *Pennsylvania Dental Assn. v. Medical Service Assn.*, 745 F.2d 248, 262 (3rd Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) ("the factual predicate of an expert's opinion must find some support in the record"); *American Bearing Co. v. Litton Industries, Inc.*, 729 F.2d 943, 949-50 at n. 14 (3rd Cir.), *cert. denied*, 469 U.S. 854 (1984) (even after *Japanese Products*, expert testimony must be based on more than "speculation and unfounded assumptions"). *See also Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977) (rejecting "expert" economic testimony based on "unsupported assumptions" and "theoretical speculations"); *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 48-49 (2d Cir. 1984) (same); *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 362-64 (6th Cir. 1978) (same); *United States v. Tranowski*, 659 F.2d 750 (7th Cir. 1981); *Lima v. United States*, 708 F.2d 502 (10th Cir. 1983).

Petitioners' real dispute is not with the Fifth Circuit's treatment of expert testimony, which is consistent with that of the other Courts of Appeals. Petitioners are unhappy that the Fifth Circuit, applying established law to the record facts, found that *their* economist's testimony was not grounded in the record and was thus insufficient to support the jury award. In short, Petitioners are asking this Court to find that the Fifth Circuit was wrong about the specific circumstances of this case. This Court, however, does "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981).

B. The Fifth Circuit Correctly Applied Texas Law Concerning Pecuniary Damages

In any case, the Fifth Circuit was correct on the merits. Petitioners' economist ignored the undisputed record evidence concerning Mr. Schwartz's earnings history. No evidence was presented of either the amount of money Mr. Schwartz had actually spent to support his family, or the amount they required for their daily necessities. The economist relied on only one objective fact, Mr. Schwartz's master's degree in agriculture – a degree which he then used to lump Mr. Schwartz in with doctors, lawyers, M.B.A.'s and all others with five or more years of college.

Under Texas law, "the pecuniary loss calculated on a projection into the future of the decedent's past earnings is the primary element of [wrongful death] awards and the awards should bear some ascertainable relation to the pecuniary benefit which the decedent's spouse or child might reasonably have expected to receive had the wrongful death not occurred." *Dover Corp. v. Perez*, 587 S.W.2d 761, 770 (Tex. Civ. App. 1979, writ ref'd n.r.e.) (citations omitted); *see Moorhead v. Mitsubishi Aircraft International, Inc.*, 828 F.2d 278, 290 (5th Cir. 1987); *Simpson v. United States*, 322 F.2d 688, 691 (5th Cir. 1963). The trial record is bereft of evidence that Joe Schwartz could, for forty years, have reasonably expected to provide his family with pecuniary benefits at the doctor/lawyer/M.B.A level reflected in the economist's statistics. The Court of Appeals properly vacated the jury's unsupported award for pecuniary losses of that magnitude.

II. Petitioners' Challenges to the Rulings Below on Punitive and Nonpecuniary Damages Pose No Seventh Amendment Issue, and Fail on Their Merits.

Petitioners have asked this Court to review two additional issues: the J.N.O.V. granted by the trial court, and affirmed by the Fifth Circuit, on the issue of exemplary damages; and the Fifth Circuit's decision to vacate the nonpecuniary damages awards and remand those for a new trial along with the pecuniary-loss award. Petitioners, no doubt realizing that this Court does not routinely review such case-specific rulings, have charged that the lower courts violated the Seventh Amendment by holding against them. Petitioners' position lacks even arguable merit.

A. Petitioners Have Not Raised A Colorable Seventh Amendment Claim

The Seventh Amendment prohibits the reexamination of jury-found facts other *"than according to the rules of the common law"* (emphasis added). The "rules of the common law" provide at least three ways that jury findings may be reexamined: through a directed verdict, a grant of judgment non obstante veredicto, and an order granting a new trial. This Court has long held that none of these procedures violates the Seventh Amendment. *Galloway v. United States*, 319 U.S. 372, 388-89 (1943) (directed verdict); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 321-22 (1967) (J.N.O.V.); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447-48 (1830) (new trial). *See Mattivi v. South African Marine Corp.*, 618 F.2d 163, 167 n. 3 (2d Cir. 1980) (argument that grant of a J.N.O.V. or directed verdict violates the Seventh Amendment "is frivolous").

Petitioners, in passing, admit as much when they argue that federal courts may not "redetermine facts found by a jury *on sufficient evidence.*" Petition at 9 (emphasis added).

Once again, Petitioners' true complaint is not that a constitutional or statutory violation has occurred, but that the courts below were merely wrong about whether the record evidence was sufficient to support their damages awards under Texas law. For example, as Petitioners' Petition makes clear, they are asking this Court to rule on whether the facts in this case satisfy the Texas standards for punitive damages set forth in *Burk Royalty Co. v. Walls*, 616 S.W. 2d 911 (Tex. 1981). Petition at 10-11. These complaints, like Petitioners' complaints about the reversal and remand of the pecuniary-loss award, are not appropriate for review by this Court. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

B. The Rulings Below Were Correct

On the merits, the Court of Appeals was correct both in affirming the denial of punitive damages and in vacating and remanding the nonpecuniary damages award for retrial along with the pecuniary damage claims. With respect to punitive damages, Petitioners failed to adduce evidence that John Deere knew that cutoff switches were a practical and effective design alternative for corn combines, and consciously chose not to use them. Such knowledge and conscious choice are essential to a punitive-damages finding under *Burk Royalty. See Newding v. Kroger Co.*, 554 S.W.2d 15, 18 (Tex. Civ. App. 1977, no

writ) (mere failure to use safer design feature does not by itself establish gross negligence).

With respect to the remand for retrial of all damages, it is well-established that a court may not order a new trial limited to particular issues "unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). *See, e.g., Atlantic Coast Line R. Co. v. Bennett*, 251 F.2d 934, 938-39 (4th Cir. 1958) (remanding for new trial of both compensatory and punitive damages, even though no error in compensatory award); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1538-39 (5th Cir. 1984). The court below acted in accordance with this presumption in favor of a broad retrial.

CONCLUSION

Petitioners conclude their Petition with several misleading appeals to sympathy. They imply that the rulings below have caused them "a terrible loss", and expressly state that the courts below have "taken" their money . . . "with no explanation", and committed "injustice." Petitioners, though, have won a jury verdict that Respondents are liable for 70% of their losses, and will soon commence a retrial after which they will be awarded all the actual damages that they can prove through sufficient evidence. The rulings that Petitioners complain of merely kept Petitioners from recovering damages that they did not prove sufficiently. Petitioners have no legitimate basis

for arguing that those rulings conflict with any Constitutional or statutory provision, any Federal Rule, or any decision of a Court of Appeals. Moreover, those rulings are correct on the merits as a matter of state law. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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